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97TH CONGRESS
2d Session

SENATE

REPORT
No. 97-451

FEDERAL TRADE COMMISSION AMENDMENTS ACT OF 1982

MAY 28, 1982.—Ordered to be printed
Filed under authority of the order of the Senate of May 12 (legislative day, May 11), 1982

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

MINORITY VIEWS AND ADDITIONAL VIEWS

[To accompany S. 2499]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2499) to amend the Federal Trade Commission Act to provide authorization of appropriations, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

PURPOSE OF BILL

The purpose of this legislation is to amend the Federal Trade Commission Act to change the investigative, adjudicative, and rulemaking authority of the Federal Trade Commission (FTC), and to extend authorizations for appropriations for the agency. The legislation would authorize to be appropriated $60.838 million in fiscal year 1983, $55.1 million in fiscal year 1984, and $54.6 million in fiscal year 1985.

BACKGROUND AND NEEDS

Under the Federal Trade Commission Act, the FTC seeks to prevent anti-competitive conduct through its authority over "unfair methods of competition," and protect consumers through its "unfair or decep-

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tive acts or practices" authority. The Commission may enforce this mandate through cases-by-cases adjudications under section 5 of the FTC Act and through industry-wide rulemaking.

In the Magnuson-Moss Act of 1975, Congress added a new section 18 to the FTC Act, providing the agency explicit authority and detailed new procedures for promulgating trade rules to prohibit "unfair or deceptive" practices.

Largely as a result of dissatisfaction with the Commission's exercise of its section 18 consumer protection rulemaking authority, Congress re-directed some of the agency's rulemakings and added additional rulemaking procedures in the FTC Improvements Act of 1980. The process of evaluating the Commission's exercise of its consumer protection authority has continued in the development of S. 2499, the Federal Trade Commission Amendments Act of 1982.

UNFAIRNESS STANDARD

In particular, evaluation and study of the Commission's authority to prohibit "unfair . . . acts or practices" has continued since 1980. Enacted as part of the Wheeler-Lea Amendment in 1938, the Commission's consumer "unfairness" authority was not a focus of enforcement action until 1964, when, as part of its Statement of Basis and Purpose for a proposed cigarette health warning rule, the Commission identified three factors to be considered in applying the prohibition against consumer unfairness: (1) whether the practice injures consumers; (2) whether it violates established public policy; and (3) whether it is unethical or unscrupulous.[1] These three factors were later quoted with apparent approval by the Supreme Court in the 1972 case of *Sperry & Hutchinson.*[2]

In response to concerns that the Commission's unfairness authority was poorly defined by these principles and potentially unbounded, the Consumer Subcommittee requested public comment on the scope of the Commission's unfairness authority,[3] and wrote to the Commission to request more specific views.

In its December 17, 1980 letter in response, the Commission abandoned one portion of its 1964 unfairness criteria and, summarizing its past use of unfairness in decided cases and rules, articulated guiding principles for future application of its unfairness mandate. Under the Commission's policy statement, unjustified consumer injury is the primary focus of the FTC Act, and the most important of the 1964 criteria. Not every consumer injury is legally "unfair," however; to justify a finding of unfairness, the injury must satisfy three tests:

> It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.[4]

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[1] Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

[2] *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 223, 244–45 n. 5 (1972).

[3] The public comments received have been printed by the Committee. See Unfairness: Views on Unfair Acts and Practices in Violation of the Federal Trade Commission Act (1980).

[4] See December 17, 1980 letter from Federal Trade Commission for Senators Ford and Danforth at page 5. This letter is printed in the record of the Committee's March 18, 1982 hearing.

With regard to the second of the 1964 criteria, the Commission observed that while "established public policy" may sometimes independently support Commission action, it is used most frequently by the Commission as a means of providing additional evidence of consumer injury. Such a policy must be "clear and well-established" and:

> Declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from a general sense of rational values. The policy should likewise be one that is widely shared, and not the isolated decision of a single state or a single court.[5]

The Commission explicitly abandoned future use of the third part of the 1964 criteria relating to "unethical and unscrupulous" conduct.

On March 5, 1982, the Commission wrote again to the Committee,[6] reaffirming the policies of its December 17, 1980 policy statement and recommending that its principles be codified into law as a statutory definition of unfairness. Section 2 of S. 2499 contains such a new definition of unfairness.

Commercial advertising

In addition to problems with the scope of the Commission's unfairness authority, the Committee has been concerned with the use of unfairness to regulate commercial advertising. Traditionally, both before and after the Wheeler-Lea Amendment of 1938, the Commission has regulated commercial advertising only to prevent deception. In its staff report on "Television Advertising to Children" (February 1978) however, the Commission contemplated regulation of some children's advertising, not because it deceived children, but because it was "unfair."

Concerned with the potentially unbounded regulation of non-deceptive commercial advertising on the basis of unfairness, Congress addressed this issue in two ways in section 11 of the FTC Improvements Act of 1980. First, the Commission's authority to issue a children's advertising rule based on unfairness was removed. (After conducting an evaluation of the basis for a children's advertising rule on a deception theory, the Commission terminated the children's advertising proceeding in 1981.)

Second, Congress placed a 3-year moratorium on the Commission's use of unfairness in new section 18 rulemakings designed to regulate commercial advertising. This moratorium on new rulemakings permitted the Commission to continue to regulate commercial advertising on the basis of deception, and the Commission retained the authority to rely on unfairness in individual cases against advertisers under section 5 of the FTC Act. However, because the unfairness standard for the regulation of commercial advertising practices goes beyond the elimination of misleading or deceptive commercial speech, it presents a

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[5] See December 17, 1980 letter from Federal Trade Commission to Senators Ford and Danforth at page 12.

[6] See March 5, 1982 letter from Federal Trade Commission to Senators Packwood and Kasten. This letter is printed in the record of the Committee's March 18, 1982 hearing.

conflict with First Amendment principles. Section 14 of S. 2499, which prohibits the Commission from relying on unfairness to regulate advertising under both section 5 and section 18, is motivated by the Committee's continued concern with the potential for abuse in this area.

Deception

During the process of developing the statutory definition of unfairness in section 2 of S. 2499, several proposals for amending the statute to incorporate a more explicit definition of "deceptive acts or practices" emerged. The supporters of these proposals expressed concerns about the Commission's past administration of the law against deception, the breadth of the Commission's discretion to prohibit a practice as deceptive, and the possibility that in enacting a statutory definition of unfairness, Congress may inadvertently cause an unintended broadening of current case-law defining deceptive practices.

Witnesses at the hearing suggested four problems with past Commission actions: First, in interpreting the meaning of a particular ad, the Commission has relied on its own expertise, often without direct evidence of how consumers would understand the ad. Second, the Commission's interpretation of advertising has not always been based on what consumers acting reasonably in the circumstances would understand the ad to mean. Third, the Commission has sometimes acted without evidence that the challenged ad was likely to injure consumers. Finally, the Commission's decisions may have sometimes harmed consumers, rather than protecting them, because they have suppressed truthful and useful information.

The Committee believes that there is merit in some of the criticisms that have been raised about past Commission deception cases.

However, the Committee has concluded that consideration of a statutory definition of deception is premature at this time. Further study and hearings are necessary to explore carefully the need for statutory change and the implications of the various proposals. In the meantime, the Committee urges the FTC to allocate its resources to deception cases involving reasonable interpretations of claims likely to lead to consumer injury. The Committee intends to continue to monitor carefully the Commission's implementation of its unfairness and deception authority.

CARE LABELING

The Committee is concerned about and will also continue to monitor the pending proposed trade regulation rule which would expand existing care labeling requirements to cover manufacturers of upholstered furniture, carpet, rugs, and seconds and irregulars of sheets, pillowcases, towels, wash cloths, and bath mats. In addition to other prerequisites of rulemaking, the Commission should determine whether a sufficient number of complaints of a serious enough nature have been received to warrant extending the existing care labeling requirements to the products of these industries. In making this determination, the FTC is advised to apply the principles underlying the prevalence test outlined in section 9 of S. 2499 to extensions of the

care labeling rule to new categories of products. Also, the Committee expects the FTC to continue its evaluation of the potential impact and costs of the proposal on small and medium-sized businesses as well as consumers, and to consider the care information already made available through voluntary industry sources before concluding a mandatory rule is in the public interest.

RULE 424

Over a year and a half ago, the FTC sought comments on the wisdom of modifying or eliminating its Rule 424 which requires that when grocery stores advertise specials they must have on hand sufficient quantities of the advertised product to meet demand.[7] Comments received in response argue that Rule 424 imposes large costs on retail food stores which may well be out of proportion to the benefits conferred on consumers who ultimately must bear the retailers' increased cost of doing business. Indeed, a study conducted for the Commission by Market Facts, Inc. suggests that consumers may be unwilling to pay the enormous costs which the rule may impose. The Committee instructs the FTC expeditiously to conclude its review of Rule 424 and to determine whether Rule 424 should be modified or eliminated. The Committee expects that the FTC will take such action within fiscal year 1983.

ACTIVITIES CONCERNING PROFESSIONALS

Since the mid-1970's, the Commission has been active in initiating studies, investigations, cases, and rules respecting state-licensed professionals, including doctors, dentists, lawyers, optometrists, and veterinarians. Much of this Commission activity has focused on traditional antitrust enforcement, such as the Commission's adjudication against the American Medical Association and the American Dental Association for alleged restraints on advertising by their members.[8]

The Commission has also proceeded under its consumer protection authority, however, principally through rulemakings under section 18 of the FTC Act. In 1978, the Commission issued its trade regulation rule on Advertising of Opthalmic Goods and Services ("Eyeglasses I" Rule) (16 C.F.R. Part 456). As promulgated, the Eyeglasses I rule would have effectively negated state and local laws and regulations which banned truthful advertising by ophthalmologists, optometrists and opticians, and also required eye doctors to give each patient a copy of his or her eyeglass prescription following an eye exam so that the patient may comparison shop for eyewear.

In 1980 the court of appeals upheld the rule's prescription release requirement, but remanded the remainder of the rule for further consideration.[9]

On December 2, 1980, the Commission issued an advance notice of proposed rulemaking in another rulemaking relating to commercial

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[7] See 16 CFR Part 424 and 45 Fed. Reg. 59634 (Sept. 10, 1980).
[8] See American Medical Association, 94 F.T.C. 701 (1978), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court without opinion, —— U.S. —— (1982).
[9] *American Optometric Association* v. *FTC*, 627 F.2d 896 (D.C. Cir. 1980).

ophthalmic practice ("Eyeglasses II" Rule). Following its investigation, the staff of the Commission recommended a rule superceding state law preventing optometrists from working for non-optometrists (such as an optician or a department store), locating a practice in a commercial setting (such as a shopping center), maintaining branch offices, and practicing under a trade name. The Commission is evaluating the comments received on this staff proposal and other regulatory options.

The Commission has also investigated similar commercial practice restrictions in the delivery of dental and legal services, although no rulemaking proceedings have been initiated. The Commission has conducted economic studies of the impact on consumers of restrictions on advertising and other restraints on commercial practice, issued advisory opinions and enforement guides in the antitrust area, studied state-law restrictions on the scope of practice of opticians and dental hygenists, and developed a model state statute governing generic drug substitution by pharmacists.

Believing that the FTC has intruded unwisely on State prerogatives in these investigations and enforcement actions, the Committee approved an exemption for professionals from FTC jurisdiction in section 3 of S. 2499.

LEGISLATIVE HISTORY

S. 2499 was introduced by Senator Kasten on May 6, 1982, following 4 days of hearings. Hearings on July 15 and 17, 1981 focused on the FTC's jurisdiction over State-regulated professionals, such as doctors, lawyers, and dentists, and the related issue of the Commission's authority to preempt State laws governing professionals. Hearings on March 18 and 19, 1982 focused on other issues, primarily relating to the Commission's authority over "unfair or deceptive acts or practices." Related legislation referred to the Committee include S. 1984, introduced on December 16, 1981 by Senator McClure, and S. 2221, introduced on March 16, 1982 by Senator Cannon. On May 11, 1982 the Committee ordered S. 2499 reported with amendments.

SUMMARY OF BILL

SECTION 1.—SHORT TITLE

The short title of this legislation is the Federal Trade Commission Amendments Act of 1982.

SECTION 2.—UNFAIR ACTS OR PRACTICES

This section would add a new subsection to Section 5 of the Federal Trade Commission Act to define unlawful "unfair acts or practices" as acts or practices that have caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. This definition would circumscribe the Commission's consumer unfairness authority for both rulemakings and case-by-case adjudications.

SECTION 3.—STATE ACTION

This section would exempt State-regulated professionals and associations of State-regulated professionals from Commission antitrust and consumer protection jurisdiction, prohibit the Commission from promulgating trade rules under section 18 of the FTC Act regulating the activities of such persons and associations which conform to applicable State law, and prohibit related use of the Commission's investigatory authority. In addition, this section would make the "State action" immunity applicable to the Commission's "unfair methods of competition" authority, just as this immunity is applied in antitrust cases under the Sherman Act.

SECTION 4.—COMPENSATION IN PROCEEDINGS

This section would repeal the Commission's authority under section 18(h) of the FTC Act to compensate participants in trade regulation rulemakings.

SECTION 5.—MAXIMUM PENALTIES

This section would amend sections 5(l), 5(m)(1)(A), and 5(m)(1)(B) of the FTC Act to place a maximum of $1 million on the total civil penalty that may be imposed under these sections for a related series of violations of a Commission consumer protection order or rule.

SECTION 6.—KNOWING VIOLATIONS OF ORDERS

This section would amend section 5(m)(1)(B) of the FTC Act (which gives the Commission the authority to go to Federal court to seek civil penalties against one company for knowing violation of an order entered against a different company) to permit the defendant to challenge in court the legal basis for the Commission's prior order, thereby codifying the U.S. District Court decision in *United States* v. *Braswell*. This section would also clarify that only litigated cease and desist orders, not consent agreements may be the basis for a 5(m)(1)(B) civil penalty action.

SECTION 7.—CONGRESSIONAL REVIEW OF RULES

This section would revise and extend the expiring authority for two-House Congressional review of Commission trade regulation rules. As modified, the Congressional review process would mirror the veto provisions of S. 1080, the Regulatory Reform Act. The current requirement for expedited court review of the constitutionality of the veto provision would be retained, however.

SECTION 8—AFFIRMATIVE RELIEF

This section would require the Commission, before ordering affirmative remedies (such as corrective advertising) in its consumer protection cases, to conduct an analysis showing that the potential benefits from such additional relief would outweigh the potential costs. The

Commission would be required to send this analysis to the House and Senate Commerce Committees. The requirements of this section would not be judicially reviewable, and they would be in effect only for the length of the authorization.

SECTION 9—PREVALENCE

This section would amend section 18(b) of the FTC Act to provide that the Commission may issue a notice of proposed rulemaking only where it has reason to believe that the challenged conduct is prevalent in the industry.

SECTION 10—EFFECTIVE DATE OF ORDERS

This section would amend section 5(g) of the FTC Act to end the present requirement for an automatic stay of Commission cease and desist orders pending appeal, and provide instead that Commission orders may be stayed by the Commission itself or by the courts (within their discretion) during the appeal process.

SECTION 11—CIVIL INVESTIGATIVE DEMANDS

This section would extend the "civil investigative demand" document procedures contained in section 20 of the FTC Act, which now apply to Commission investigations under its consumer protection authority, to investigations concerning any act or practice or method of competition declared unlawful by a law administered by the Commission. Principally, this amendment would have the effect of requiring that Commission antitrust investigations be conducted pursuant to section 20, as consumer protection investigations already are.

SECTION 12—AGRICULTURAL COOPERATIVES

This section would amend section 5(a) of the FTC Act to prohibit the FTC from conducting any study or investigation of any agricultural marketing order and to prohibit the FTC from initiating any study, investigation or prosecution of any agricultural cooperative until the Secretary of Agriculture determines that the acts or transactions in question fall outside the scope of the immunity conferred by the Capper-Volstead Act or section 6 of the Clayton Act.

SECTION 13—TRADEMARKS

This section would extend, for the length of the authorization, the expiring prohibition on Commission actions under the Lanham Act to invalidate trademarks.

SECTION 14—COMMERCIAL ADVERTISING

This section would amend section 5(b) of the FTC Act to prohibit on a permanent basis Commission rulemakings and other cases which

prohibit or otherwise regulate commercial advertising on the basis that the advertising constitutes an unfair act or practice.

SECTION 15—CREDIT UNIONS

This section would exempt credit unions from Commission jurisdiction on the same basis that banks and savings and loans are now exempt. Credit unions are regulated by the National Credit Union Administration.

SECTION 16—AUTHORIZATION OF APPROPRIATIONS

This section would reauthorize the Commission for three years at Office of Management and Budget recommended funding levels: $60,838,000 in fiscal year 1983; $55,100,000 in 1984; and $54,600,000 in 1985.

SECTION 17—EFFECTIVE DATE

Unless otherwise provided, this legislation will be effective upon enactment.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washintgon, D.C., May 13, 1982.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 2499, the Federal Trade Commission Amendments Act of 1982.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 2499.
2. Bill title: Federal Trade Commission Amendments Act of 1982.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science and Transportation, May 11, 1982.
4. Bill purpose: S. 2499 authorizes the appropriation of $60.8 million in 1983, $55.1 million in 1984 and $54.6 million in 1985 to fund the activities of the Federal Trade Commission (FTC). These levels are identical to those requested in the President's 1983 budget. It also makes a number of other changes regarding FTC jurisdiction, regulations and practices.

5. Cost estimate:

	Millions
Authorization level:	
Fiscal year:	
1982	$60.8
1983	55.1
1984	54.6
1985	-----
1986	-----
Estimated outlays:	
Fiscal year:	
1982	55.6
1983	55.6
1984	55.2
1985	4.7
1986	-----

Including outlays from prior years' budget authority, total outlays for the FTC in 1983 are estimated to be $61.1 million.

The cost of this bill falls within budget function 370.

6. Basis of estimate: For purposes of this estimate, it was assumed that the authorization levels specified in S. 2499 would be appropriated prior to the beginning each fiscal year. Outlays reflect historical spending patterns.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Mary Maginniss.

10. Estimate approved by:

JAMES L. BLUM,
Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

This legislation is expected to reduce the burdens of FTC regulation, principally bv excluding certain classes of persons and entities from the scope of Commisison jurisdiction. Section 3 of the bill would exclude state-regulated professionals and their professional associations from certain Commission enforcement and investigative authority. Section 15 of the bill would exclude credit unions from Commission jurisdiction to the same extent that banks and savings and loan institutions are exempt. Any adverse economic impact of Commission regulation is likely to be reduced by clarifications to Commission authority contained in other sections. The legislation contains no new major obligations or authority for the Commission, and it is not likely to affect substantially the privacy of individuals or paperwork requirements.

AGENCY COMMENTS

In addition to receiving comments from the FTC and individual Commissioners during and soon after the hearings, the Committee received the following comments on this legislation:

FEDERAL TRADE COMMISSION,
Washington, D.C., May 27, 1982.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: We are writing to express the Commission's deep concern about three special exemptions contained in S. 2499, recently adopted by the Committee.[1] Our letter addresses the Committee's actions to: (1) exempt state-licensed professions from the FTC's jurisdiction; (2) exempt commercial advertising from the Commission's unfairness jurisdiction; and (3) exempt mergers of agricultural cooperatives from the Commission's competition jurisdiction. If legislation containing these provisions is enacted, these special exemptions will cause substantial injury to consumers and to our nation's economy.

STATE-LICENSED PROFESSIONS

The bill approved by the Committee would grant individual professionals who are licensed at the state level, as well as their private professional associations, total immunity from FTC law enforcement. As a result, the Commission would be barred from investigating the most clear-cut and egregious violations of the antitrust and consumer protection laws, simply because these violations were committed by licensed professionals. Price fixing, boycotts, false advertising and other conduct proscribed by federal law would be shielded from FTC challenge, even if the activities in question were totally unregulated by the state.

Proponents of this special exemption have presented several arguments to support their view that an exemption for professionals from the Commission's law enforcement authority is both necessary and appropriate. The Commission believes that these arguments are riddled with inconsistencies as well as distortions of the FTC's enforcement activities, and we would like to take this opportunity to present our response.

First, proponents claim that this special examination for professionals is nothing more than an effort to preserve state sovereignty and promote federalism. Yet, at the same time, they suggest that the exemption will not leave professional activities unreviewable by the federal government, as the Department of Justice will retain its authority to prosecute violations by professionals. If antitrust enforcement by the Department of Justice is relied on to support this exemption, proponents of the provision cannot seriously claim that it is sought in the interests of federalism. Indeed, this argument suggests that the ultimate goal is a blanket exemption for professionals from the antitrust laws. Further, the Department of Justice has no consumer protection authority comparable to that of the FTC. Hence, the benefits gained by Commission initiatives in the consumer protection area would be lost altogether.

The Commission also believes that proponents of this special exemption have distorted the concept of federalism. The basic tenents of

[1] Individual Commissioners have expressed, or may express in the future, separate views to the Committee on other provisions of S. 2499.

federalism seek to accommodate both state and federal interests. In this, as in other areas, our national policy favoring free enterprise, competition and informed consumer choice can and should co-exist with state regulation.

Another argument made to support the exemption for professionals, presented frequently by certain sectors of the health care industry, is that Commission enforcement initiatives in the health care field interfere with traditional state laws and regulations governing delivery of services and quality of care. This argument overstates and thereby distorts the scope and intent of Commission activities in two significant ways.

First, while states traditionally have regulated certain aspects of the health care industry, state regulation has been directed primarily at licensure requirements, scope of practice questions, and other so-called quality of care issues. The FTC, on the other hand, has examined the practices of health care and other professionals in the conduct of their business affairs. These so-called "business practices"—as distinguished from quality of care or "scope" of practice—include virtually the same types of activities as are engaged in by all other businesses, large and small, such as debt collection, advertising, contracting for goods and services, and the determination of fee schedules, office locations, hiring practices and the like. It is the illegal business practices of professionals that the Commission seeks to prohibit. Because virtually the same business practices—legal and illegal—are engaged in both by professional and non-professional business establishments, there is no valid reason for arbitrarily immunizing the anticompetitive and/or deceptive practices of the former group from FTC scrutiny and prosecution.

A second important distinction which should be made is that most FTC investigations and prosecutions involving the professions have challenged not state laws or regulations, but rather illegal conduct by private parties. With only one exception, the FTC has sought to prosecute private parties for illegal business practices or conduct not reached by state statutes or regulations. No reason has been advanced to justify a rule of law that would prohibit the Commission from investigating such allegedly anticompetitive or deceptive business practices simply because they are engaged in by doctors, dentists, ophthalmologists, or other professionals. In the one instance where the FTC has challenged the enforcement of state law or regulation, it has acted only after compiling substantial evidence of the existence of widespread and significant consumer injury without offsetting benefits for consumer health care delivery.

Mr. Chairman, in addition to explaining our objections to the arguments that are raised continually in support of this special exemption for professionals, we would like to address other critical concerns we have.

The outer reaches of the exemption are as yet unclear. The definition of "professional" contemplated by the bill's proponents includes a broad range of groups and may insulate literally hundreds of occupations from FTC scrutiny. At the very least, this legislation would remove activities involving hundreds of billions of dollars in commerce from Commission law enforcement efforts, to the serious detriment of the public and our economy.

The law enforcement activities that will be halted if this bill is enacted are among the most significant and beneficial of the agency's efforts.[2] Our enforcement activities have challenged collusive private conduct by professionals interfering with interstate commerce, such as price-fixing conspiracies, group boycotts, and suppression of truthful advertising. The Commission has acted, for example, to prevent physician groups from engaging in group boycotts designed to thwart the development of health maintenance organizations,[3] and to prohibit dental associations from organizing boycotts intended to obstruct insurers' cost-containment programs.[4]

A Commission proceeding involving medical association codes which ban truthful advertising by physicians provided evidence that such private codes have been used by professional associations for a variety of anticompetitive purposes. (The Second Circuit Court of Appeals upheld the Commission's complaint in this case, and the Supreme Court recently affirmed the decision.[5]) Such codes have been used, for example, to block a church organization from publicizing a low-cost cardiac stress clinic, to stop doctors from advertising their willingness to make house-calls, and to deny information to older Americans about which doctors would accept Medicare reimbursement as full payment.

In addition, the Commission has challenged deceptive advertising by professionals, such as physicians who failed to disclose the health risks associated with synthetic hair implants,[6] and has examined the effects of restrictions on the business practices of professionals, such as prohibitions on locating a professional practice in a shopping center or restrictions on working for a corporation that is not owned by professionals.[7] These FTC inquiries are designed to determine whether certain restrictions impose significant costs on consumers without any corresponding benefits.

Our "Eyeglasses" proceeding is an example of how competition promoted by Commission action benefits consumers. Before the Commission's Eyeglasses Rule [8] became effective in 1978, statutory and professional code restrictions in many states prohibited advertising on eyeglass and contact lens costs, thus preventing the free flow of information about such costs.[9] The Commission's Rule permitted providers of eyeglasses and contact lenses to compete through cost and service advertising. Consumers have benefitted in two ways. In the short run they have been able to comparison shop for the best prices. Over the longer run, they have benefitted from reduced prices brought about by adver-

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[2] In many of the areas described below, the Commission has obtained consent agreements. Enforcement of these existing agreements also would be halted by this exemption, to the detriment of the American consumer.

[3] Medical Service Corp. of Spokane County, 88 F.T.C. 906 (1979); Forbes Health System Medical Staff, 94 F.T.C. 1042 (1979); American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 50 U.S.L.W. 4313 (U.S. Mar. 23, 1982).

[4] Indiana Dental Association et al., 93 F.T.C. 392 (1979).

[5] American Medical Association, 94 F.T.C. 701 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divide dcourt ,50 U.S.L.W. 4313 (U.S. Mar. 23, 1982). See also American Dental Association, 94 F.T.C. 403 (1979); Broward County Medical Association, FTC File No. 811 0194, 47 Fed. Reg. 11,285 (Mar. 16, 1982), corected, 47 Fed. Reg. 12,809 (Mar. 25, 1982) (acceptance of consent agreement).

[6] E.g., Terrance D. Lasko, M.D., 96 FTC 73 (1980).

[7] Bureau of Consumer Protection, Federal Trade Commission, State Restrictions on Vision Care Providers: The Effects on Consumers 1–92 (1980).

[8] 16 C.F.R. § 456 (1982).

[9] 43 Fed. Reg. 23993–96 (1978) ("Eyeglasses Rule" statement of basis and purpose).

tising. As an example, the average price for soft contact lenses at the time the Eyeglass Rule took effect in 1978 was $256. By 1981, the average price had dropped to $204 (equal to $146 in 1978 dollars).[10] Virtually all industry observers attribute this startling decline to the FTC's Eyeglasses Rule and the competitive environment it created.[11] Thus, this Rule alone already has saved hundreds of millions of dollars for American consumers.

We cannot state in strong enough terms our opposition to the Committee's action. And, we are firmly convinced that professionals who do not engage in illegal conduct have no reason to seek this exemption. The bill would confer privileged status on one class of citizens—professionals—permitting them to avoid the basic tenets of our free market economy, competition and informed consumer choice.

UNFAIR ADVERTISING

The Commission also opposes the bill's exemption of commercial advertising from its jurisdiction over "unfair acts or practices." We believe that the Commission's unfairness authority, articulated clearly, should be applied across the board and that groups who engage in otherwise prohibited conduct should not be singled out for special treatment.

Proponents of this special exemption argue that the breadth of the Commission's unfairness authority has created uncertainties for advertisers. However, the bill would amend the statute by providing that the Commission may exercise its "unfairness" authority only when: (1) an act or practice causes substantial injury to consumers; (2) the injury cannot reasonably be avoided by consumers; and (3) the act or practice has no offsetting benefits.

In addition to this statutory standard, if it is enacted, Commission decisions also must conform with the Supreme Court's decision in *Central Hudson Gas Corp.* v. *Public Service Commission of N.Y.*, 447 U.S. 557, 564–566 (1980). There the Court held that, if commercial speech is neither misleading nor related to unlawful activity, the government may regulate it only if: (1) there is a substantial interest to be served by the regulation, (2) the regulation directly advances that interest, and (3) the restriction imposed by the regulation is no more extensive than is necessary. In addition, specific Commisson actions and decisions always are subject to Congressional oversight. Despite these protections which insure against inappropriate Commission actions based on the unfairness authority, this section of the bill creates a total exemption, insuring no Commission action under this authority, no matter how helpful to consumers.

Finally, the exemption creates a substantial ambiguity about its scope by failing to define "commercial advertising." Because this term may be interpreted broadly, it is unclear whether the provision covers labeling, point-of-sale literature, oral sales presentations, etc. If "advertising" is interpreted to extend beyond media advertising, the exemption could limit the Commission's ability to protect consumers even further.

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[10] The source of these data is an annual consumer survey performed by Health Products Research, Inc., Morristown, New Jersey.

[11] See, e.g., Business Week, Nov. 5, 1981, at 125.

We believe that the Committee's decision to define statutorily the Commission's "unfairness" jurisdiction should eliminate any of the uncertainties that may have confronted commercial advertisers. Moreover, we are firmly convinced that Commission actions based on this authority will provide significant benefits to consumers. In our view, there is simply no reason to exempt any acts or practices that fall within the Committee's definition of "unfairness" from the Commission's jurisdiction.

AGRICULTURAL COOPERATIVES

Finally, the Commission objects to the Committee's amendment prohibiting the FTC from "conducting any study, investigation, or prosecution" of any Capper-Volstead agricultural cooperative "until the Secretary of Agriculture has made a final determination that the acts or transactions in question are outside the scope of the immunity conferred by the Capper-Volstead Act or section 6 of the Clayton Act."

In the Commission's view, this section of the bill seriously undercuts the ability of the Commission to enforce antitrust and consumer protection laws against agricultural cooperatives for conduct which is not exempt from the FTC Act. First, the section creates a special administrative procedure for a narrow class of Commission respondents by entrusting in another agency the initial jurisdictional determination. Under current law, as is the case with other administrative agencies, the Commission makes the initial determination subject to review by the Courts. Moreover, this initial determination as set out in the bill, purporting to be binding on the Commission as an independent agency, is made by an official of an executive department, thus partially undermining the rationale for the creation of an independent Commission.

The procedure contemplated by this provision also insures a major delay in Commission proceedings by encouraging respondents wishing to avoid Commission enforcement to engage in lengthy appeals in the federal court system of the Secretary's initial determination. During this protracted litigation, which could easily take several years, no Commission investigation or court action could take place. Thus, any opportunity to remedy the harm caused to consumers or competition by the cooperative will be delayed for a substantial period. Moreover, this section virtually guarantees the Commission will be unable to seek immediate preliminary injunctive relief to prohibit unlawful mergers, to enjoin deceptive practices, or any other unlawful behavior engaged in by an agricultural cooperative. Consequently, this section undermines the intent of Section 13(b) of the FTC Act, reflecting a Congressional intent for the Commission to halt quickly unlawful behavior under appropriate circumstances.

Finally, the amendment could interfere with a proceeding currently in litigation in which it is alleged that a cooperative violated the antitrust laws by purchasing certain non-cooperative assets. In our view, there is no reason to so interfere with the Commission's adjudicative process.

CONCLUSION

Mr. Chairman, the Commission believes that the special exemptions included in this bill will dismantle the Commission's law enforcement

authority with respect to three significant sectors of the American economy. The exemptions clearly have no justification in law or in fact, provide no benefits to consumers or competition, and plainly are contrary to the public interest.

For these reasons, we oppose the special exemptions included in this bill.

By direction of the Commission.

Sincerely yours,

JAMES C. MILLER III,
Chairman.

SECTION-BY-SECTION ANALYSIS

SHORT TITLE

Section 1

This section contains the short title of the legislation, the "Federal Trade Commission Amendments Act of 1982."

UNFAIR ACTS OR PRACTICES

Section 2

This section would amend section 5 of the FTC Act to add a new subsection defining "unfair acts or practices" as acts or practices that have caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. This definition would apply both to adjudications under section 5 and rulemakings under section 18.

In accordance with the Commission's recommendation, this section is intended to codify, as a statutory definition of unfair acts or practices, the principles of the Commission's December 17, 1980 policy statement on unfairness. Since the Commission's policy statement itself is based on the Commission's decided cases and rules, this section codifies existing law. The incorporation of these criteria should enable the Commission to proceed in its development of the law of unfairness with a firm grounding in the precedents decided under this authority, and consistently with the approach the Commission and the courts have taken in the past. The Committee believes this codification is necessary in order to provide the Commission, its staff, regulated business, and reviewing courts greater guidance on the meaning of unfairness and to prevent a future Commission from abandoning the principles of the December 17, 1980 letter.

Consumer injury may be "substantial" under this section if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers. In accordance with the Commission's December 17, 1980 letter, substantial injury is not intended to encompass merely trivial or speculative harm. In most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks. Emotional impact and more subjective types of harm alone are not intended to make an injury unfair.

In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the Commission quantify the detrimental and beneficial

effects of the practice in every case. In many instances such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the Commission carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence.

The Committee knows that State Attorneys General have expressed a concern that the definition of unfairness in this section may be construed to affect provisions in State statutes or State case law.

Since the mid-1960's, virtually every State has enacted statutes prohibiting deceptive practices, while at least 30 States also prohibit unfair practices. These State Consumer Protection Acts are enforced almost exclusively through recourse to State courts. Many of the statutes direct courts to be guided by interpretations of the FTC Act. In other States, the courts have interpreted these laws consistently with developments under Federal law. State courts have applied the unfairness standard in a variety of contexts including unconscionable pricing practices, high pressure sales tactics, unhabitable living conditions in leased premises, and abusive debt collection practices.

The Committee intends no effect whatever on those or other developments under State law. This section represents a consensus view of an appropriate codification of Federal standards, undertaken after careful assessment of the Commission's past activities. The Committee's action should not be understood as suggesting that the criteria in this section are necessarily suitable in the further development of State unfairness law or that the Commission's future construction of these criteria delimits in any way the range of State decisionmaking. Sound principles of federalism limit the impact of this section to the Commission only.

STATE ACTION

Section 3

This section would place several limitations on the Commission's authority in areas subject to State regulation.

Subsection (a) would amend section 5 of the FTC Act to add a new subsection providing that notwithstanding any other provisions of the FTC Act, the Commission shall not find a method of competition to be unfair if, in an action under the Sherman Act, such method of competition would be held to constitute "State action."

Beginning with the Supreme Court's 1943 decision in *Parker* v. *Brown*[11] courts have held conduct to be exempt from antitrust challenge under the Sherman Act if the conduct was required by a State, pursuant to a clearly articulated State policy, and actively supervised.[12]

The purpose of subsection (a) is to make this judicially developed "State action" immunity applicable to the Commission's "unfair methods of competition" authority, just as the immunity is presently applicable in actions under the Sherman Act. The Committee intends that as courts continue to refine and develop the state action immunity, these refinements and changes apply to future Commission actions as well.

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[11] 317 U.S. 341 (1943).

[12] See, e.g., *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Subsections (b) through (h) would place certain limitations on the Commission's authority with respect to "practitioners of a profession whose members are licensed and regulated by a state" and "incorporated or unincorporated associations of state-regulated professionals."

For purposes of subsections (b) through (h), the Committee intends the terms "practitioner of a profession" and "professional" to have a meaning similar to the meaning of "professional employe" under the National Labor Relations Act.[13] In brief, the Committee intends that a "practitioner" or "professional" be one engaged in work (i) predominantly intellectual and varied in character, (ii) involving the consistent exercise of discretion and judgment, (iii) involving tasks non-standardizable in terms of time, and (iv) requiring a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital. However, just as the Labor Board and courts have interpreted the fourth condition—the requirement for an advanced course of specialized instruction—to be the most important, see, e.g., *Westinghouse Electric Corp.* v. *N.L.R.B.*, 440 F.2d 7 (2d Cir. 1971), cert. denied, 404 U.S. 853 (1971), the Committee intends this fourth condition to be the predominant and most important requirement of the definition, as well.

By using the terms "practitioners of a professio whose members are licensed and regulated by a State" and "State-regulated professionals", the Committee intends to limit the exclusions contained in subsections (b) through (h) to professionals actively regulated by State Governments. While a mandatory State licensure scheme is necessary for a profesional to come within these terms, licensure is not in itself sufficient. A State must also maintain an active, comprehensive regulatory and enforcement program designed to ensure that licensed professionals are conducting their practices in the public interest.

The Committee anticipates, therefore, that in most states, professionals covered by the exclusions contained in subsections(b) through (h) may include lawyers, physicians, dentists, engineers, accountants, architects, nurses, chiropractors, pharmacists, actuaries, optimetrists, veterinarians, podiatrists, clinical psychologists, and surveyors.

Thus, subsection (b) would first amend section 4 of the FTC Act to define "incorporated or unincorporated associations of state-regulated professionals" as nonprofit professional associations of practitioners of a State-regulated profession.

Subsection (c) would then amend section 5(a)(2) of the FTC Act to exempt state-regulated professionals and associations of state-regu-

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[13] See 29 U.S.C. 152(12), which provides that:

"(12) The term 'professional employee' means—

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

"(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

lated professionals from the Commission's antitrust and consumer protection authority under the FTC Act. This exemption would apply both to the Commission's adjudicatory and rulemaking authority.

Subsection (d) would remove the Commission's authority under 6(a) of the FTC Act to gather and compile information concerning, and to investigate associations of State-regulated professionals.

Subsection (e) would remove the Commission's authority under 6(b) of the FTC Act to order associations of State-regulated professionals to prepare special reports or answers to specific questions.

Subsection (f) would reiterate the primary substantive limitations placed on the Commission in subsections (c), (d), and (e) by providing that nothing in section 6 of the FTC Act shall authorize the Commission to initiate any investigation or proceeding or promulgate any rule or regulation respecting any State-regulated professional or any association of State-regulated professionals.

Subsection (g) would further amend section 6(a) of the FTC Act by providing that the Commission shall have no authority under section 6(a) to gather and compile information concerning, or investigate any State-regulated professional or any association of State-regulated professionals "acting in conformance with applicable State law."

Subsection (h) would add two new subparagraphs to section 18(a) of the FTC Act. A new subparagraph 18(a)(3) would provide that the Commission shall have no authority under section 18 to prescribe a trade regulation rule regulating the activity of any State-regulated professional or any association of State-regulated professionals "which conforms to applicable State law." A new subsection 18(a)(4) would reiterate the primary, substantive limitation placed on the Commission's enforcement authority in subsection (c) by providing that nothing in section 18 shall authorize the Commission to promulgate any rule respecting any State-regulated professional or any association of State-regulated professionals.

The exemptions contained in subsections (c) through (f) are intended to apply to State-regulated professionals acting in their professional capacities and to associations of professionals acting as nonprofit professional associations in the traditional pursuit of the professional goals of their members. Subsections (b) through (f) are not intended to prohibit the FTC from investigating, bringing enforcement actions, or promulgating rules respecting State-regulated professionals or associations of State-regulated professionals engaged in alleged unfair methods of competition or unfair or deceptive acts or practices outside the intended scope of the exemption. For example, if a physician owned a real estate development concern involved in fradulent land sales, the Commission would be free under subsections (b) through (f) to enforce the FTC Act with respect to such conduct, regardless of the status of the physician as a State-regulated professional physician.

The limitations contained in subsections (g) and (h) with respect to activity by State-regulated professionals and associations of State regulated professionals "in conformance with" or "which conforms to applicable State law" intended to relate to activity pursuant to State laws

that mandate or affirmatively authorize some specific activity or lack of activity. If State law is silent or an activity, or if reference to an activity in State law does not constitute affirmative authorization for the activity or lack of activity, the limitations in subsections (g) and (h) do not apply. The term "applicable State law" is intended to mean State statutes or duly-promulgated State agency regulations intended primarily to regulate the practices or activities of State-regulated professionals or associations of State-regulated professionals.

The limitations contained in subsections (d), (e), (f), and (g) on investigatory activity are not intended to impair the well-settled principle that the Commission may initiate an investigation to determine if it has jurisdiction over a matter. See e.g., *FTC* v. *Swanson*, 560 F. F.2d 1 (1st Cir. 1977). However, once the Commission obtains sufficient information to conclude that subsections (d), (e), (f), or (g) apply, or that it has no jurisdiction over a matter, the investigation must be ended promptly.

Subsections (b) through (h) of the bill were adopted by the Committee as an amendment to S. 2499. As originally introduced, section 2 of S. 2499 added two new subsections to section 5 of the FTC Act. One new subsection, which would make the State action doctrine applicable to FTC unfair methods of competition enforcement, was not amended by the Committee and is part of S. 2499, as reported. A second new subsection would have prohibited the Commission from using its consumer protection authority under either section 5 or section 18 of the FTC Act to invalidate State laws prescribing licensure requirements for and the permissible scope of practice of State-licensed professionals. Subsections (b) through (h) were adopted by the Committee in place of the second new subsection.

The exemptions for professionals from Commission jurisdiction in subsections (b) through (h) reflect the Committee's belief that regulation of professionals by the Commission is unnecessary and inappropriate in light of other extensive State and Federal regulatory and oversight authority. First, the Commission's antitrust enforcement authority largely duplicates U.S. Department of Justice, State, and private enforcement authority. The Department of Justice has criminal as well as civil authority to enforce the Federal antitrust laws, and State attorneys general and private parties injured by antitrust violations may also sue professionals and recover treble damages. In addition, in many States, State antitrust laws cover professionals.

Second, the Commission's consumer protection enforcement authority duplicates the States' well-developed, traditional licensure and regulatory schemes for professionals. Indeed, some of the Commission's proposed consumer protection rules, such as the two eyeglasses rules currently under development, are a direct repudiation of the States' regulatory role, in that these rulemakings contemplate preemption of State laws designed to govern professional practice. The Committee believes that State governments are the more appropriate entities to regulate the practice of professionals and that Commission intervention through its consumer protection jurisdiction is unwise and unwarranted.

COMPENSATION IN PROCEEDINGS

Section 4

This section would repeal section 18(h) of the FTC Act, the Commission's authority to provide compensation for reasonable attorneys fees, expert witness fees, and other costs to participants in section 18 trade regulation rulemakings. No funds were appropriated for this program in fiscal year 1982.

MAXIMUM PENALTIES

Section 5

This section would amend sections 5(1), 5(m)(1)(A), and 5(m)(1)(B) of the FTC Act to provide that when the Commission seeks civil penalties under these sections for violations of Commission consumer protection rules or orders, the maximum civil penalty for any related series of violations shall not exceed $1 million. This section would not in any way affect the Commission's authority to seek civil penalties for violations of rules or orders based on the Commission's "unfair methods of competition" authority.

Sections 5(1), 5(m)(1)(A), and 5(m)(1)(B) provide for a civil penalty of up to $10,000 "for each violation." These sections provide that each day of a continuing violation may be deemed a separate offense; otherwise a "violation" is not defined. Potentially, a firm may be subject to millions of dollars of penalties if each item in a bulk mailing or each copy of a magazine distributed constituted a separate "violation" of a Commission order or rule.

The Committee believes that the maximum civil penalty exacted in such circumstances should not exceed $1 million. The Committee intends the term "related series of violations" to refer to technical violations of an order or rule that arise from a common marketing plan or campaign involving a series of actions related in planning, dissemination and time of occurrence.

In placing a maximum of $1 million on the penalty that may be exacted under these civil penalty provisions, the Committee wishes to emphasize that it intends to express no disapproval of the level of civil penalties that have been exacted under these provisions in the past, except to the extent that those penalties have exceeded $1 million,[14] and that the Committee does not intend this amendment necessarily to result in higher average civil penalties in the future.

Approximately 90 percent of the civil penalties exacted under these provisions since 1975 have been under $100,000, and the average civil penalty has been under $50,000. The Committee believes that the penalties in these cases have generally reflected properly the severity of the offenses involved.

The Committee does not intend that the $1 million limitation be used as a negotiating device by the Commission staff to extend improperly the scope of an order or to obtain settlements. The Committee is sensitive to the fact that the proposed $1 million ceiling is susceptible to abuse if the Commission does not negotiate in good faith,

[14] To date, civil penalties in two cased have exceeded this maximum. See *United States* v. *Reader's Digest Association Inc.*, 662 F.2d 955 (3d. Cir. 1981), cert. denied, —— U.S. —— (1982). ($1,750,000 penalty); *United States* v. *Pestline Products Corp.*, No. C–73–0944 (N.D. Cal., June 16, 1976) ($1,036,000 penalty).

before seeking a civil penalty, based upon a bona fide determination that there has been a real impact upon the consuming public from the claimed violation. The maximum penalty should be reserved for cases involving a very substantial consumer injury or an egregious violation of clearly established illegal standards.

KNOWING VIOLATIONS OF CEASE-AND-DESIST ORDERS

Section 6

The purpose of this section is to clarify the scope of the Commission's existing authority under section 5(m)(1)(B) of the FTC Act to obtain civil penalties against persons who violate the holdings of prior cases. Section 5(m)(1)(B) provides that the Commission may obtain a civil penalty against a person who violates the holding of a prior case—even though that person was not a party—if the Commission can prove that the violator had actual knowledge that the practice was unfair or deceptive and unlawful.

Subsection (a) of this section would amend section 5(m)(1)(B) to make clear that such non-respondent liability may not be imposed where such person has violated the standards of an outstanding consent agreement. The Committee intends that a case settled by consent agreement would not qualify as a predicate for a section 5(m)(1)(B) proceeding, because the legal and factual issues in question would not have been subject to challenge in a adjudicatory proceeding. By contrast, the Commission isues a final cease-and-desist order only after all factual and legal issues have been fully adjudicated before an administrative law judge, subject to review by the Commission. Thus, it is the Commission's current practice not to seek penalties based upon nonrespondent violations of outstanding consent agreements, and this section codifies this practice. The Committee intends, however, that where a consent order is entered during court review of a litigated Commission cease-and-desist order, the Commisseion's holding and order may be used as a predicate for a section 5(m)(1)(B) proceeding.

Subsection (b) would amend section 5(m)(1)(B) to make clear that where the Commission seeks a civil penalty based on a violation of a holding in a case to which the defendent was not a party, the defendant may challenge in the penalty suit the validity of the Commission's legal determination of what constitutes an unfair or deceptive practice under section 5(a)(1). The court would examine the Commission's interpretation under the appropriate standard of review. See, e.g., *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The Commission has already conceded in litigation under section 5(m)(1)(B), and one court has so held, that defendants in sections 5(m)(1)(B) cases must be given this right. *United States* v. *Braswell, Inc.*, 1981–82 Trade Cas. ¶ 64,325 (N.D. Ga. 1981), *aff'd*, No. 81–9666 (11th Cir., March 3, 1982). Because subsection (b) is intended to codify the Commission's current policy, as developed in the *Braswell* litigation, the Committee intends that subsection (b) apply to cases currently in litigation as well as cases initiated under section 5(m)(1)(B) following enactment of this legislation.

CONGRESSIONAL REVIEW OF RULES

Section 7

This section would amend the FTC Act to make Congressional review and veto authority for new Commission rules a permanent part of the law.

Legislative veto authority for Commission rules was first enacted in section 21 of the FTC Improvements Act of 1980. Under this provision, the Commission must submit newly-promulgated rules to Congress for review, and a rule will not take effect if both Houses disapprove the rule by concurrent resolution within 90 days. Since enactment of the Improvements Act, the disapproval mechanism was utilized once, on May 26, 1982, when Congress disapproved the Commission's trade regulation governing sales of used motor vehicles. The veto authority contained in section 21 of the Improvements Act expires on September 30, 1982 at the end of the current authorization.

This section would make a somewhat modified two-House veto procedure a permanent part of the FTC Act. Principally, differences between this section and section 21 of the Improvements Act are designed to expedite Congressional consideration of Commission rules. For example, rather than have an inflexible 90-day review period, this section would provide first for an initial 45 day period. If the House and Senate Commerce Committees do not report a disapproval resolution within that time and are not discharged (after 30 days), the rule can become effective. If a disapproval resolution is reported, or a Committee is discharged, a 30 day period would follow for floor action, and a further 30 day period for action by the other House. A rule can become effective immediately if either House defeats a disapproval resolution.

The veto procedure contained in this section is the same procedure contained in the section 13 of S. 1080, the Regulatory Reform Act, legislation approved by the Senate of March 24, 1982.

Subsection (b) of this section retains the requirement, contained in section 21 of the Improvements Act, for exepdited court review of constitutional challenges to this section.

AFFIRMATIVE RELIEF

Section 8

This section provides that the Commission may not expend funds in fiscal years 1983, 1984, and 1985 to enter an order in consumer protection cases under section 5(b) of the FTC Act containing "remedial requirements other than a requirement to discontinue the same or a similar act or practice" unless the Commission conducts an analysis showing that the potential benefits from such additional relief would outweigh the potential costs, and transmits a copy of the analysis to its Senate and House oversight committees. This section applies only to administrative orders governing unfair tor deceptive acts or practices.

At present, section 5(b) of the FTC Act limits the Commission to entry of orders "requiring (a violator of the act) to cease and desist from using such * * * (unfair or deceptive) act or practice." This lan-

guage has been construed by courts (both with respect to the Commission and where similar language appears in the organic statutes of other agencies) to authorize a wide variety of affirmative remedies where such remedies are reasonably necessary to stop and prevent recurrence of the unlawful practice. The Committee does not intend by this provision to alter in any fashion the Commission's existing remedial authority as construed by the courts under section 5(b). It is the Committee's intent, however, that the class of remedies requiring a respondent to do more than "discontinue the same or a similar act or practice" encompass certain affirmative remedies currently permitted under the agency's cease and desist authority.

One example of a remedial provision that would be covered by the requirements of this section is corrective advertising. However, orders which merely forbid an advertiser to continue making a statement without disclosing a material fact (if the failure to disclose such fact is found to make the statement deceptive) are not covered by this section. Nor does the Committee intend that the section apply to "fencing in" relief, as where the Commission prohibits a generic type of deception based on findings of a particular deceptive practice, or where the Commission prohibits a particular type of deceptive practice as to a class of products based upon findings of deceptive practices as to one. This section is similarly inapplicable to compliance reporting provisions now routinely included in all Commission orders or to remedial requirements that are entered with the consent of the respondent.

This section requires that with respect to covered order provisions, the Commission shall conduct an analysis of the costs and benefits of such provisions, and not enter such order provision unless it concludes that the potential benefits outweigh the potential costs. The Committee does not intend to require rigorous quantification of either costs or benefits, but does require that the Commission make its best estimate, based upon all reasonably available evidence.

This section further provides that compliance with its provisions shall in no respect constitute a basis for challenge to a Commission order. The determination of whether a particular order provision is covered by this section and, if so, the methodology of the analysis and the Commission's determination whether its benefits outweigh its costs, rest within the sole determination of the Commission, and are not judicially reviewable. Subsection (a)(3) of this section requires, however, that the Commission shall submit all analyses it performs under this section to its Congressional oversight Committees, which will then be in position to determine whether the Commission has substantially complied with the section and whether or not renewal or modification of the section in future legislation is desirable. This section is not intended to involve the Committees in the merits of individual cases, but rather to permit the Committees to review the results of the Commission's exercise of these new requirements.

PREVALENCE OF UNLAWFUL ACTS AND PRACTICES

Section 9

This section would amend section 18(b) of the FTC Act to reemphasize the importance of prevalence as a basis for trade regulation rule-

making. Although the Commission has generally exercised appropriate discretion in initiating rulemaking proceedings, the Committee believes a statutory standard to guide the exercise of this discretion is desirable.

The section provides that the Commission may issue a notice of proposed rulemaking only if it has "reason to believe" that unfair or deceptive acts or practices are "prevalent". Prevalence exists only if the Commission has issued cease and desist orders regarding acts and practices that are addressed by the rule, or if other information available to the Commission indicates a "pattern" of unlawful conduct.

The Commission should not initiate a trade regulation rulemaking where only isolated and insignificant violations have occurred. Rulemaking is permissible only where there have been several cease and desist orders or other evidence of a pattern of unlawful conduct. The Commission may, of course, consider the extent to which unlawful conduct causes significant economic injury in deciding whether to commence a rulemaking proceeding. It is the combined impact of the injury and the violations found which should be considered. The "reason to believe" standard is intended to bar any judicial review.

EFFECTIVE DATE OF CEASE-AND-DESIST ORDERS

Section 10

This section would amend section 5(g) of the FTC Act to make most Commission cease-and-desist orders effective 60 days after service unless stayed by the Commission or a court.

Currently, Commission cease-and-desist orders become final within 60 days only if no petition for review has been filed. Otherwise, the effective date of the entire order must await the decision of the Court of Appeals or the Supreme Court as the case may be. Under present law, unless the Court of Appeals grants extraordinary ancillary relief, a respondent may continue to engage in conduct which the Commission has determined unlawful until the ultimate disposition of a petition for review, which often takes years.[15] Thus, in some cases, respondents are encouraged to file petitions for review, based on frivolous or other unmeritorious claims, largely for the purpose or effect of delay. This section would reduce the incentive to file petitions for review simply for dilatory purposes.

Moreover, as many challenges to Commission decisions relate only to certain provisions of a cease-and-desist order, there is no compelling reason to delay the effective date of the order in its entirety in each case, as at present.

The Committee believes that the proposed amendment offers sufficient protection to those parties with legitimate reasons for noncompliance by permitting them to obtain a stay of the order from the Commission in the first instance, the U.S. Court of Appeals before which a petition to review is pending, or the Supreme Court if a petition for certiorari has been filed. To insure against delay in action upon applications for a stay, this section would permit the Court of Appeals to consider a stay request if the Commission had not acted within 30 days of the receipt of such an application.

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[15] Chairman Miller testified that: "Of all cases finally decided by a court of appeals during the four-year period from January 1, 1977, over two-thirds of the Commission's orders were substantially affirmed. Yet the delay in the effectiveness of these affirmed orders ranged from 18 to 48 months and averaged approximately 29 months." Prepared Statement of James C. Miller III, March 18, 1982, at 6.

The procedure contemplated by this section is the norm for other federal agencies and also reflects the practice in the federal court system. Similar provisions are found in the statutes of the Civil Aeronautics Board, the Environmental Protection Agency, the Federal Communications Commission, and the Federal Energy Administration to name a few.[16]

Because of the substantial impact on business operations of a divestiture order, this section would retain the current mandatory stay requirements as to such orders. This section also retains the current definition of finality with respect to the initiation of consumer redress actions and actions arising from knowing violations of the holding of Commission decisions by non-parties.

CIVIL INVESTIGATIVE DEMANDS

Section 11

This section would amend section 20 of the FTC Act to require that all Commission law enforcement investigations be conducted pursuant to civil investigative demand procedures ("CID"). Under current law, the CID procedures are limited to the Commission's consumer protection investigations. Because these procedures have worked well at the Commission, and because the Department of Justice successfully used CID's in its antitrust investigations, the Committee believes that the CID procedures should apply to the Commission's antitrust investigations as well. The Committee intends no change in the scope or usage of CID's as discussed in the report of the provision enacted as Section 20. See Rep. No. 96–500, 96th Congr, 12 Sess 23–25 (1976).

AGRICULTURE COOPERATIVES

Section 12

This section, as amended by the Committee, would broaden current limitations on the Commission's authority to study or investigate agricultural marketing orders and to study, investigate or prosecute agricultural cooperatives.

Section 20 of the FTC Improvements Act of 1980 prohibited the Commission from using funds authorized in 1980, 1981, and 1982 of the "purpose of conducting any study or investigation of any agricultural marketing orders" or for the "purpose of conducting any study, investigation, or prosecution of any agricultural cooperative" for any conduct which would be immune from antitrust liability under the Capper-Volstead Act (7 U.S.C. 291–292).[17] The Conference Report summarized the intent of Congress in enacting section 20:

> This section has been added to ratify the spirit and intent of the Capper-Volstead Act (7 U.S.C. 291–292). The Conferees believe that the rationale for the limited antitrust exemption contained in the staute is valid.

As originally introduced by Senator Kasten on May 6, 1982, this section would have continued this limitation on Commission authority

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[16] See, e.g., 49 U.S.C. § 1485(a) (CAB); 7 U.S.C. § 135b(d), 42 U.S.C. § 4915(c) (EPA); 47 U.S.C. § 402 (FCC); 29 U.S.C. § 160(g) (NLRB) and 15 U.S.C. § 771(b) (SEC).

[17] The Capper-Volstead Act provides a limited antitrust exemption for agricultural cooperatives to permit collective activities related to processing, preparing for market, handling and marketing of agricultural commodities.

over agricultural cooperatives for the length of the new authorization.

However, during its consideration of this legislation on May 11, 1982, the Committee adopted an amendment offered by Senator Kasten that would establish new procedures in any case in which the Commission examines the activities of an agricultural cooperative.

As amended by the Committee, this section would amend section 5 of the FTC Act to make a permanent part of the law prohibition on Commission study or investigation of agricultural marketing orders. Further, this section would prohibit the Commission from initiating any new study. investigation or prosecution of any agricultural cooperative until the Secretary of Agriculture has determined that the acts or practices in question are outside the scope of the immunity conferred by the Capper-Volstead Act and section 6 of the Clayton Act.

The Committee believes that an agricultural cooperative should not be forced to engage in protracted and expensive litigation to challange a Commission determination with respect to whether the cooperative's conduct is subject to or exempt from antitrust scrutiny under the FTC Act. This provision would ensure that in the future the scope of the Capper-Volstead immunity would be assessed initially by the Secretary of Agriculture, subject to judicial review. Thus, the Secretary of Agriculture would henceforth decide, in the first instance, whether conduct engaged in by an agricultural cooperative which the Commission believed to be anticompetitive or otherwise violative of the antitrust laws is nonetheless within the exemption.

While the amendment does not specify a time period within which the Secretary of Agriculture must make his determination, the Committee intends that such determination be made within a reasonable period of time.

This section is not intended to restrict the right of the Department of Justice or of private parties to challenge agricultural cooperative conduct. Nor does the Committee intend that this section affect the pre-merge notification provisions of the Hart-Scott-Rodino Antitrust Improvement Act.

TRADEMARKS

Section 13

This section would prohibit the Commission, in fiscal years 1983, 1984, 1985, from taking any action under section 14 of the Lanham Act (15 U.S.C. 1064) with respect to the cancellation of the registration of any trademark on the ground that such mark has become the common descriptive name of an article or substance. This section would continue, for the length of the new authorization, the limitation on Commission trademark litigation contained in section 18 of the FTC Improvements Act of 1980. This section does not affect any authority that the Commission may have under other statutes to bring an action challenging the validity of a trademark nor its authority under the Lanham Act to seek to have a mark cancelled or grounds other than the ground it has become "the common descriptive name of an article or substance."

COMMERCIAL ADVERTISING

Section 14

This section would amend section 5(a)(2) of the FTC Act to provide that the Commission shall have no authority under sections 5 or 18 of the FTC Act to prohibit or otherwise regulate any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an "unfair act or practice in or affecting commerce."

The purpose of this section is thus to make permanent the present limitation on regulation of "unfair" commercial advertising under the Commission's section 18 rulemaking authority (a limitation that expires at the end of fiscal year 1982) and to extend this permanent limitation to regulation of "unfair" commercial advertising under the Commission's section 5 adjudicatory authority. This section would permit the Commission to continue to regulate commercial advertising on the basis that such advertising is deceptive, and this section would permit continued reliance on "unfairness" authority to regulate practices other than "commercial advertising".

For purposes of this section, the term "commercial advertising" denotes promotional messages that appear in broadcast or print media, including promotional mailings. It is not intended to cover oral representations, representations in credit contracts, debt collection notices, and the like, which would remain subject to the Commission's unfairness jurisdiction.[18]

Further, this section is intended to apply to regulation by the Commission of the content of commercial advertising, and not to regulation of practices that may somehow pertain to such advertising but are not themselves advertising. For example, this section would not affect the Commission's authority to regulate practices that ban or restrain commercial advertising, or to regulate "practices" that are unfair, e.g., placing sample razor blades in a newspaper insert.

The Committee believes that the limitation contained in this section is warranted because the constitutional protection accorded to nondeceptive commercial speech is threatened by the broad grant of "unfairness" jurisdiction contained in the FTC Act. The fact that "purely" commercial speech is within the protection of the First Amendment is no longer subject to doubt.[19] In recent Supreme Court decisions defining the limits of governmental power to regulate commercial speech, the Court has made it clear that government retains the power to proscribe misleading or deceptive advertising.

The "unfairness" standard has no proper place in the regulation of commercial speech as the standard is too vague to avoid an unacceptable risk of abridging First Amendment principles of free speech, and does not take into account the mandate that the least restrictive form of regulation must be used consistent with meeting the substantial governmental interest involved.[20] Moreover, the Commission's use of the

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[18] See, e.g., *Horizon Corp.* (Dkt. No. 9017 .May 15, 1981); *Spiegel, Inc.* v. *FTC*, 540 F.2d 287 (7th Cir. 1976); *General Motors Corp.*, 95 F.T.C. 825 (1980).

[19] *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S., 748, 762 (1976).

[20] It is suggested that the recent decision of the Supreme Court in *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York*, 447 U.S. 557 (1980) provides authority for regulating truthful non-deceptive advertising. However, *Hudson Gas* may be distinguished from the present issue in that it involved the regulation of a "public utility" by a government agency. Since the government must approve both the rates and expenses (including advertising) of a public utility, *Hudson Gas* may not authorize similar limits on truthful advertising by an unregulated person or firm.

unfairness standard has survived litigation in cases dealing with unfair methods of competition or unfair acts or practices, not advertising.[21] Because the unfairness standard goes beyond the elimination of misleading or deceptive commercial speech, it raises an unacceptable potential for conflict with First Amendment principles.

Moreover, the Committee is persuaded that the FTC's existing authority to prohibit deceptive acts or practices is sufficient to permit the Commission to police abusive advertising practices. The Committee believes that illegal advertising practices prohibited by the Commission in the past could be reached by its deception authority. Consequently, the Committee believes this amendment does not in any way undercut appropriate Commission law enforcement but only protects against unwarranted and constitutionally sensitive actions against commercial advertising in the future.

While it appears that the Commission has, in the past, attacked certain abusive advertising practices as "unfair," it has also attacked these same practices as "deceptive," and this section should, therefore, not result in legalization of such practices in the future. One example is the Commission's advertising substantiation program. Unsubstantiated advertising was originally addressed as an "unfair" practice, see *Pfizer, Inc.*, 81 F.T.C. 23 (1972), but subsequent Commission decisions have firmly established that dissemination of unsubstantiated advertisements is a deceptive practice, as well.[22] It should be noted that in advocating enactment of this section in testimony before the Committee, representatives of the major advertising trade associations said that they did not intend "to affect in any way the FTC's power to require that positive claims made in advertisements must be substantiated." This section is not intended to impair in any way the Commission's advertisng substantation program.[23]

A second example relates to commercial advertising depicting unsafe or unlawful activity.[24] While such cases have been addressed in the past as both "unfair" and "deceptive" practices, representatives of the advertising industry testified that they "could clearly be brought under a deception theory." The Committee believes that to the extent such advertisements are deceptive because they fail to reveal material facts, the advertisements may be deceptive.

CREDIT UNIONS

Section 15

This section would amend portions of sections 5, 6, and 18 of the FTC Act to exempt federally chartered and federally insured credit

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[21] See, e.g., *FTC* v. *R. F. Keppel & Bros.*, 291 U.S. 304 (1934) ; *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

[22] E.g., *National Comm'm on Egg Nutrition*, 88 FTC 89, 191 (1976), aff'd, 570 F.2d 157 (7th Cir. 1977), cert denied, 439 U.S. 821 (1978) ; *Sears, Roebuck & Co.*, 95 FTC 406, 520–21 (1980), aff'd, No. 80–7368 (9th Cir., May 6, 1982).

[23] In approving the ad substantiation program the Committee intends to incorporate the general scope of this program as it has been endorsed by the Commission and the courts. We recognize that its application will require further elaboration by the Commission and the courts. The Committee has not reviewed, and takes no position on the FTC staff position in various FTC ad substantiation cases which are currently pending.

[24] See, e.g., *Uncle Ben's Inc.*, 89 FTC 131 (1977) (ad portrayed children cooking at a stove) ; *Mego Industries, Inc.*, 92 FTC 186 (1978) (ad portrayed child using electric appliance near sink of water) ; *General Foods Corp.*, 86 FTC 831 (1975) (ad portrayed Euell Gibbons eating wild plants in ad for Grape-Nuts cereal) ; *AMF, Inc.*, 95 TCF 310 (1980) (ad showed children riding bicycles in unsafe manner). The cases were consent settlements and were never litigated. Cases in which advertisements depict usage of a product in an unsafe or inappropriate manner have occurred infrequently in the past, and this is an area in which the Committee hopes that there will be continued cooperation between the Commission and industry.

unions from Commission jurisdiction in the same manner that banks and savings and loan institutions are presently exempted.

When the Commission was created in 1914, banks were specifically exempted from the regulatory and investigative authorities of the newly created Commission, because, as depository institutions, they were subject to close federal regulatory control by the Federal Reserve Board. Savings and loan institutions under the authority of the Federal Home Loan Bank Board were granted a parallel exemption in July of 1979, by enactment of Public Law 96–37. Under the terms of the exemptions provided to banks and savings and loans, these institutions are excluded from the Commission's enforcement and investigative authority under sections 5, 6 and 18 of the FTC Act, but section 18(f) provides that whenever the Commission promulgates a trade ragulation rule under section 18, the Federal Reserve Board and the Federal Home Loan Bank Board must promulgate a substantially similar rule respecting banks and savings and loans unless these agencies determine that the challenged acts or practices are not unfair or deceptive with respect to those institutions.

Federally chartered and federally insured credit unions are extensively regulated pursuant to the Federal Credit Union Act (12 U.S.C. 1751–1795) by the National Credit Union Administration (NCUA), an independent Federal agency with primary responsibility for the chartering, supervision, regulation and examination of credit unions chartered and/or insured by the Federal government. The Federal regulatory presence with respect to credit unions clearly parallels the presence with respect to banks and savings and loan institutions, and the Committee believes that there is no reason to treat credit unions differently.

Although the Commission has never brought an enforcement action against a credit union for violations of the FTC Act, it does have a number of pending rules that would directly affect credit union lending practices. Thus, this section would end the potential for the unnecessary, costly and duplicative Government regulation that follows from having both the Commission and the NCUA regulate credit unions by providing credit unions the same exemption from Commission jurisdiction now provided to banks and savings and loans.

The Committee is satisfied that NCUA has the necessary regulatory and enforcement tools to protect the member-owners of credit unions from unfair or deceptive acts or practices. The Committee intends that NCUA be able to use its full authority under both sections 120 and 206 of the Federal Credit Union Act to ensure compliance by federally chartered and federally insured credit unions. In addition, the Committee notes that the U.S. Department of Justice will retain antitrust authority over credit unions, as it has over banks and savings and loans.

The Committee expects the NCUA to administer faithfully the rulemaking requirements of section 18(f) as amended, and intends to monitor closely implementation of this section.

AUTHORIZATION OF APPROPRIATIONS

Section 16

This section would provide for a 3-year reauthorization for the Commission, at authorized funding levels of $60,838,000 for fiscal year 1983; $55,100,000 for fiscal year 1984; and $54,600,000 for fiscal year 1985. These funding levels are the levels recommended by the Office of Management and Budget in the President's fiscal year 1983 budget submission. These funding levels represent a reduction in funding from fiscal year 1982, in which $80 million was authorized, and $68,774,000 is estimated to be expended.

EFFECTIVE DATE

Section 17

This section would provide that, unless otherwise provided, provisions of this legislation become effective on the date of enactment.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 2499.

Senator Packwood offered an amendment to S. 2499 that would have deleted section 12 of the bill, a section prohibiting FTC adjudications and rulemakings regulating commercial advertising on the basis of unfairness. Since Gorton has then offered a substitute amendment to Senator Packwood's amendment. Under Senator Gorton's amendment, rather than omit from the bill any restriction on the Commission's use of unfairness to regulate commercial advertising, the Commission would be prohibited for the length of the authorization from regulating commercial advertising on the basis of unfairness in rulemaking.

On a rollcall vote of 4 yeas and 12 nays as follows, the Gorton amendment was defeated:

YEAS	NAYS
Packwood	Goldwater [1]
Kassebaum [1]	Schmitt
Gorton	Danforth
Riegle [1]	Pressler
	Stevens
	Kasten
	Cannon
	Hollings [1]
	Inouye
	Ford
	Exon [1]
	Heflin

[1] Proxy.

On a rollcall vote of 2 yeas and 13 nays as follows, the Packwood amendment was defeated:

YEAS	NAYS
Packwood	Goldwater [1]
Gorton	Schmitt
	Danforth
	Pressler
	Stevens
	Kasten
	Cannon
	Hollings [1]
	Inouye
	Ford
	Riegle [1]
	Exon [1]
	Heflin

[1] Proxy.

Senator Stevens offered an amendment to section 2 of S. 2499 that (1) deleted from section 2 a prohibition on Commission preemption of State laws prescribing the licensure requirements for and permissible scope of practice of State-licensed professionals, and (2) incorporated in section 2 amendments to sections 5, 6, and 18 of the FTC Act to exempt State-regulated professionals and their associations from certain Commission enforcement and investigatory authority and to prohibit Commission preemption of State law. During the discussion, Senator Stevens amended his amendment, without objection, to limit the prohibition on preemption of State laws to State laws regulating professionals.

On a rollcall vote of 10 yeas and 5 nays as follows, the Stevens amendment, as amended, was adopted:

YEAS	NAYS
Goldwater [1]	Packwood
Schmitt	Kassebaum [1]
Pressler	Gorton
Stevens	Cannon
Kasten	Riegel [1]
Hollings [1]	
Inouye	
Ford	
Exon [1]	
Heflin	

[1] Proxy.

Senator Kasten offered an amendment to S. 2499 that would have deleted section 12 of the bill, relating to agricultural cooperatives, and substituted a provision amending section 5(a) of the FTC Act prohibiting certain Commission activities relating to agricultural cooperatives absent a determination of the Secretary of Agriculture.

On a rollcall vote of 8 yeas to 4 nays as follows, the Kasten amendment was adopted:

YEAS	NAYS
Goldwater [1]	Packwood
Schmitt	Gorton
Pressler	Cannon
Stevens	Riegel [1]
Kasten	
Ford	
Exon [1]	
Heflin	

[1] Proxy.

On a rollcall vote of 12 yeas and 3 nays as follows, the Committee ordered S. 2499 favorably reported:

YEAS	NAYS
Goldwater [1]	Packwood
Schmitt	Gorton
Kassebaum [1]	Cannon
Pressler	
Stevens	
Kasten	
Hollings [1]	
Inouye [1]	
Ford	
Riegle [1]	
Exon [1]	
Heflin	

[1] Proxy.

Without objection, the Committee authorized the staff to make any necessary technical of conforming amendments to the bill.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

THE FEDERAL TRADE COMMISSION ACT

Section 4 of That Act

Sec. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:

"*Incorporated or unincorporated associations of State-regulated professionals*" *means nonprofit professional associations of practitioners who are independently licensed and regulated by the laws of the respective States.*

SECTION 5 OF THAT ACT

SEC. 5. (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except *practitioners of a profession whose members are licensed and regulated by a State as a condition of independent practice within the State, incorporated or unincorporated associations of State-regulated professionals*, banks, savings and loan institutions described in section 18(f)(3), *Federally chartered and Federally insured credit unions described in section 18(f)(4)*, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce*: Provided, That the Commission shall have no authority under this section or section 18 to prohibit or otherwise regulate any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce.*

(3)(A) The Commission shall have no authority to conduct any study, investigation, or prosecution of any agricultural cooperative which meets the requirements of the Act entitled "An Act to authorize association of producers of agricultural products", approved February 18, 1922 (7 U.S.C. 291–292), commonly known as the Capper-Volstead Act, until the Secretary of Agriculture has made a final determination that the acts or transactions in question are outside the scope of the immunity conferred by the Capper-Volstead Act or of section 6 of the Clayton Act (15 U.S.C. 17).

(B) The Secretary of Agriculture shall publish any determination made under this paragraph in the Federal Register, and shall simultaneously transmit his determination to the Commission.

(C) Any affected party may, within 30 days after the date of the determination of the Secretary of Agriculture, seek review of such determination in the federal district court in any district in which such party has an office or does business.

(b)–(f) * * *

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

[(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the circuit court of appeals, and no petition for certiorari has been duly filed; or]

(2) Upon the 60th day after such order is served, if a petition for review has been duly filed, except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) (a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending; or

(3) For purposes of section 19(a)(2) and section 5(m)(1)(B), if a petition for review of the order of the Commission has been filed—

(3) For purposes of section 19(a)(2) and section 5(m)(1)(B), if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed; or

[(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.]

(4) In the case of an order requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h)-(k) * * *

(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission. *Where a final order of the Commission is based upon a finding that acts or practices are unfair or deceptive, the maximum civil penalty for any related series of violations under this subsection shall not exceed $1 million.*

(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation. *The maximum civil penalty for any related series of violations under this subsection shall not exceed $1 million.*

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order *, other than a consent order,* with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

The maximum civil penalty for any related series of violations under this subsection shall not exceed $1 million.

(C) * * *

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo *, and such defendant may seek review of the Commission's legal determination that the*

act or practice which formed the basis for the issuance of the cease and desist order is an unfair or deceptive act or practice.

(3) * * *

(n) For purposes of this section, unfair acts or practices are acts or practices that have caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.

(o) Notwithstanding any other provision of this Act, the Commission shall not find a method of competition to be unfair if, in an action under the Sherman Act of July 2, 1890 (15 U.S.C. 1 et seq.), such method of competition would be held to constitute State action.

SECTION 6 OF THAT ACT

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting *incorporated or unincorporated associations of State-regulated professionals*, banks, savings and loan institutions described in section 18(f)(3), *Federally chartered and Federally insured credit unions described in section 18 (f)(4)*, and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations: *Provided, however, That the Commission shall have no authority to gather and compile information concerning, or investigate, the organization, business, conduct, practices, and management of any practitioner of a profession whose members are licensed and regulated as a condition of independent practice within a State or any incorporated or unincorporated association of State-regulated professionals acting in conformance with applicable State law.*

(b) To require, by general or special orders, persons, partnerships, and corporations engaged in or whose business affects commerce, excepting *incorporated or unincorporated associations of State-regulated professionals*, banks, savings and loan institutions described in section 18(f)(3), *Federally chartered and Federally insured credit unions described in section 18(f)(4)*, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c)–(g) * * *

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of

manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Provided, That the exception of "banks, savings and loan institutions described in section 18(f)(3), *Federally chartered and Federally insured credit unions described in section 18(f)(4)*, and common carriers subject to the Act to regulate commerce" from the Commission's powers defined in clauses (a) and (b) of this section, shall not be construed to limit the Commission's authority to gather and compile information to investigate, or to require reports or answers from, any person, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations, or industry which is not engaged, or is engaged only incidentally in banking, in business as a savings and loan institution, *in business as a Federally chartered or Federally insured credit union*, or in business as a common carrier subject to the Act to regulate commerce.

The Commission shall establish a plan designed to substantially reduce burdens imposed upon small businesses as a result of requirements established by the Commission under clause (b) relating to the filing of quarterly financial reports. Such plan shall (1) be established after consultation with small businesses and persons who use the information contained in such quarterly financial reports; (2) provide for a reduction of the number of small businesses required to file such quarterly financial reports; and (3) make revisions in the forms used for such quarterly financial reports for the purpose of reducing the complexity of such forms. The Commission, not later than December 31, 1980, shall submit such plan to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign Commerce of the House of Representatives. Such plan shall take effect not later than October 31, 1981.

No officer or employee of the Commission or any Commissioner may publish or disclose information to the public, or to any Federal agency, whereby any line-of-business data furnished by a particular establishment or individual can be identified. No one other than designated sworn officers and employees of the Commission may examine the line-of-business reports from individual firms, and information provided in the line-of-business program administered by the Commission shall be used only for statistical purposes. Information for carrying out specific law enforcement responsibilities of the Commission shall be obtained under practices and procedures in effect on the date of the enactment of the Federal Trade Commission Improvements Act of 1980, or as changed by law.

Nothing in this section (other than the provisions of clause (c) and clause (d)) shall apply to the business of insurance, except that the Commission shall have authority to conduct studies and prepare reports relating to the business of insurance. The Commission may exercise such authority only upon receiving a request which is agreed to by a majority of the members of the Committee on Commerce, Science, and Transportation of the Senate or the Committee on Interstate and Foreign Commerce of the House of Representatives. The authority to conduct any such study shall expire at the end of the Congress during which the request for such study was made.

Nothing in this section shall authorize the Commission to initiate any investigation or proceeding, or promulgate any rule or regulation (excepting rules and regulations that are already the subject of litigation in the courts) affecting any practitioner of a profession whose members are licensed and regulated by a State as a condition of independent practice within a State or any incorporated or unincorporated association of State-regulated professionals.

SECTION 18 OF THAT ACT

SEC. 18 (a)(1) Except as provided in [subsection (i)] *subsection (j)* the Commission may prescribe—

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1) of this Act), and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) The Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

(3) The Commission shall have no authority for purposes of this section to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5 (a)(1) of this Act) regulating the activity of any practitioners of a profession whose members are licensed and regulated by a State as a condition of independent practice within a State or any incorporated or unincorporated association of State-regulated professionals which conforms to applicable State law.

(4) Nothing in this section shall authorize the Commission to promulgate any rule affecting any practitioner of a profession whose members are licensed and regulated by a State as a condition of independent practice within a State or any incorporated or unincorporated association of State-regulated professionals.

(b)(1)–(2) * * *

(3) The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if it has issued cease and desist orders

regarding such acts or practices, or any other information available to the Commission indicates a pattern of unfair or deceptive acts or practices.

(c)–(e) * * *

(f)(1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to consumers) by banks or savings and loan institutions described in paragraph (3), each agency specified in paragraph (2) or (3) of this subsection shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks subject to its jurisdiction. The Board of Governors of the Federal Reserve System (with respect to banks) and the Federal Home Loan Bank Board (with respect to savings and loan institutions described in paragraph (3)) *and the National Credit Union Administration Board (with respect to federally chartered and federally insured credit unions described in paragraph (4))* shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices. Whenever the Commission prescribes a rule under subsection (a)(1)(B) of this section, then within 60 days after such rule takes effect each such Board shall promulgate substantially similar regulations prohibiting acts or practices of banks or savings and loan institutions described in paragraph (3), *or federally chartered and federally insured credit unions described in paragraph (4)*, as the case may be, which are substantially similar to those prohibited by rules of the Commission and which impose substantially similar requirements, unless (A) [either such Board finds that] *any such Board finds that* such acts or practices of banks and savings and loan institutions described in paragraph (3), *or federally chartered and federally insured credit unions described in paragraph (4)*, as the case may be, are not unfair or deceptive, or (B) the Board of Governors of the Federal Reserve System finds that implementation of similar regulations with respect to banks, *savings and loan institutions or federally chartered and federally insured credit unions* would seriously conflict with essential monetary and payments systems policies of such Board, and publishes any such finding and the reasons therefor, in the Federal Register.

(2)–(3) * * *

(4) Compliance with regulations prescribed under this subsection shall be enforced with respect to federally chartered credit unions and federally insured credit unions under sections 120 and 206 of the Federal Credit Union Act (12 U.S.C. 1776 and 1786).

[(4)](5) For the purpose of the exercise by any agency referred to in paragraph (2) of its powers under any Act referred to in that paragraph, a violation of any regulation prescribed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in paragraph (2), each of the agencies referred to in that paragraph

may exercise, for the purpose of enforcing compliance with any regulation prescribed under this subsection, any other authority conferred on it by law.

[(5)](*6*) The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not impair the authority of any other agency designated in this subsection to make rules respecting its own procedures in enforcing compliance with regulations prescribed under this subsection.

[(6)](*7*) Each agency exercising authority under this subsection shall transmit to the Congress not later than March 15 of each year a detailed report on its activities under this paragraph during the preceding calendar year.

(9) * * *

[(h) (1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

[(2) The Commission shall reserve an amount equal to 25 percent of the amount appropriated for the payment of compensation under this subsection for any fiscal year for use in accordance with this paragraph. Such reserved amount shall be available solely for the payment of compensation to persons who either (A) would be regulated by the proposed rule involved; or (B) represent persons who would be so regulated. Any portion of such reserved amount which is not used for the payment of compensation to such persons under this paragraph shall revert to the Treasury of the United States.

[(3) The amount of compensation which may be paid to any person under this subsection in connection with the participation by such person in any particular rulemaking proceeding under this section may not exceed $75,000. The aggregate amount of compensation paid under this subsection in any fiscal year to any person for all rulemaking proceedings in which such person participates during such fiscal year may not exceed $50,000.

[(4) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $750,000.

[(5) The Commission, in connection with the administration of this subsection pursuant to rules prescribed by the Commission under paragraph (1), shall establish a small business outreach program. Such program shall—

> [(A) solicit public comment from small businesses whose views otherwise would not be adequately represented, in order to ensure a fair determination in rulemaking proceedings under this section; and

[(B) encourage the participation of small businesses in the compensation program administered by the Commission under this subsection by disseminating to small businesses information which explains the procedures and requirements applicable to the receipt of compensation under such program.]

[(i)](*h*) The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of the enactment of the Federal Trade Commission Improvements Act of 1980 or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.

[(j)](*i*) (1) For purposes of this subsection, the term "outside party" means any person other than (A) a Commissioner; (B) an officer or employee of the Commission; or (C) any person who has entered into a contract or any other agreement or arrangement with the Commission to provide any goods or services (including consulting services) to the Commission.

(2) Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall authorize the Commission or any Commissioner to meet with any outside party concerning any rulemaking proceeding of the Commission. Such rule shall provide that—

(A) notice of any such meeting shall be included in any weekly calendar prepared by the Commission; and

(B) a verbatim record or a summary of any such meeting, or of any communication relating to any such meeting, shall be kept, made available to the public, and included in the rulemaking record.

[(k)](*j*) Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall prohibit any officer, employee, or agent of the Commission with any investigative responsibility or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission, from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such communication is required for the disposition of ex parte matters as authorized by law.

SECTION 20 OF THAT ACT

SEC. 20. (a) For purposes of this section:

(1) * * *

(2) The term "Commission investigation" means any inquiry conducted by a Commission investigator for the purpose of

ascertaining whether any person is or has been engaged in any [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice or method of competition declared unlawful by a law administered by the Commission.*

(3) The term "Commission investigator' means any attorney or investigator employed by the Commission who is charged with the duty of enforcing or carrying into effect any provisions relating to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)) *act or practice or method of competition declared unlawful by a law administered by the Commission.*

(4)–(6) * * *

(7) The term "violation" means any act or omission constituing an [unfair or deceptive act or practice in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice method of competition declared unlawful by a law administered by the Commission.*

(b) For the purpose of investigations performed pursuant to this section with respect to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice or method of competition declared unlawful by a law administered by the Commission,* all actions of the Commission taken under section 6 and section 9 shall be conducted pursuant to subsection (c).

(c)(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice or method of competition declared unlawful by a law administered by the Commission,* the Commission may, before the institution of any proceedings under this Act, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony.

(2)–(12) * * *

(d)–(j) * * *

CONGRESSIONAL REVIEW OF RULES

SEC. 24. (a)(1) Notwithstanding any other provision of law, any final rule subject to this section shall be considered a recommendation of the Commission to the Congress and shall have no force and effect as a rule unless such rule has become effective in accordance with this section.

(2)(A) Notwithstanding any other provision of law, no recommended final rule of the Commission may become effective until the expiration of a period of 45 days of continuous session of Congress after the date on which the rule is received by the Congress under paragraph (4) of this subsection. If before the expiration of such 45-

day period, either appropriate committee orders reported or is discharged from consideration of a resolution of disapproval with respect to such rule, such rule may not become effective if within 30 days of continuous session of Congress after the date on which such committee orders reported or is discharged from further consideration of such resolution, one House of Congress agrees to such resolution of disapproval of the rule and within 30 additional days of continuous session of Congress after the date of transmittal of the resolution of disapproval to the other House, such other House agrees to such resolution of disapproval.

(B) Whenever an appropriate committee reports a resolution of disapproval pursuaant to this paragraph, the resolution shall be accompanied by a committee report specifying the reaasons for the committee's action.

(C) Notwithstanding subparagraph (A) of this paragraph, a recommended final rule may become effective at any time after the day on which either House of Congress defeats a resolution of disapproval, and, in the case of the Senate, a motion to reconsider such resolution is disposed of.

(3)(A) Except as provided in subparagraph (B) of this paragraph, if Congress adjourns sine die at the end of a Congress prior to the expiration of the periods specified in paragraph (2)(A) of this subsection with respect to a recommended final rule, the rule shall not become effective during that Congress. The Commission may transmit such rule at any time after the first day of the following Congress in accordance with paragraph (4) of this subsection, and the periods specified in paragraph (2)(A) of this subsection with respect to any such rule shall begin on the date such rule is transmitted to the Congress.

(B) If—

(i) Congress adjourns sine die at the end of a Congress prior to the expiration of the periods specified in paragraph (2)(A) of this subsectioan with respect to a recommended final rule;

(ii) the Commission transmits such recommended final rule to the Congress at least 45 days of continuous session of Congress prior to the day on which Congress adjourns sine die at the end of a Congress; and

(iii) either House of Congress does not adopt a resolution of disapproval with respect to such recomemnded final rule prior to the day on which Congress adjourns sine die at the end of a Congress,

such rule may become effective at any time after the day on which Congress adjourns sine die at the end of a Congress

(4)(A) On the day on which a recommended final rule is transmitted for publication to the Federal Register, the Commission shall transmit to the Secretary of the Senate and the Clerk of the House of Representatives a copy of the complete text of such recommended final rule and a copy of any other materials transmitted to the Federal Register with such rule.

(B)(i) If either House of Congress is not in session on the day on which a recommended final rule is transmitted for publication to the Federal Register, the periods specified in paragraph (2)(A) of this subsection with respect to such rule shall begin on the first day thereafter when both Houses of Congress are in session.

(ii) The Secreatry of the Senate and the Clerk of the House of Representatives are authorized to receive recommended final rules and materials transmitted under this paragraph on days when the Senate or the House of Representatives, as the case may be, is not in session.

(C) On the day on which the Secretary of the Senate and the Clerk of the House of Representatives receive a recommended final rule and the materials transmitted with such rule, the Secretary and the Clerk shall transmit a copy of such rule and such materials to the appropriate committees.

(b)(1) If a recommended final rule of the Commission is disapproved under this section, the Commission may issue a recommended final rule which relates to the same acts or practices as the disapproved rule. Such recommended final rule—

(A) shall be based upon—

(i) the rule making record of the recommended final rule disapproved by the Congress; or

(ii) such rule making record and the record established in any supplemental rule making proceedings conducted by the Commission in accordance with section 553 of title 5, United States Code, in any case in which the Commission determines that it is necessary to supplement the existing rule making record; and

(B) may reflect such changes as the Commission considers necessary or appropriate, including such changes as may be appropriate in light of Congressional debate and consideration of the resolution of disapproval with respect to the rule.

(2) The Commission, after issuing a recommended final rule under this subsection, shall transmit such rule to the Secretary of the Senate and the Clerk of the House of Representatives in accordance with subsection (a) of this section, and such rule shall only become effective in accordance with such subsection.

(c) Congressional inaction on or rejection of a resolution of disapproval with respect to a recommended final rule shall not be deemed an expression of approval of such rule.

(d) The provisions of this subsection and subsections (a)(3) and (4), and (b)(2)(B) and (4)(D) of this section, are enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions of disapproval; and they supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(e) Except as provided in subsection (h) of this section, resolutions of disapproval shall, upon intoduction or receipt from the other House of Congress, be immediately referred by the presiding officer of the Senate or the House of Representatives to the appropriate committee of the Senate or the House of Representatives, as the case may be.

(f)(1)(A) Except as provided in subparagraph (B) of this paragraph, if the committee to which a resolution of disapproval has been referred does not report such resolution within 30 days of continuous session of Congress after the date of transmittal to the Congress of the recommended final rule to which such resolution relates, it shall be in order to move to discharge such committee from further consideration of such resolution.

(B) If the committee to which a resolution of disapproval transmitted from the other House has been referred does not report such resolution within 20 days after the date of transmittal of such resolution from the other House, it shall be in order to move to discharge such committee from further consideration of such resolution.

(2) Any motion to discharge under paragraph (1) of this subsection must be supported in writing by one-fifth of the Members, duly chosen and sworn, of the House of Congress involved, and is highly privileged in the House and privileged in the Senate (except that it may not be made after a resolution of disapproval has been reported with respect to the same rule); and debate thereon shall be limited to not more than 1 hour, the time to be divided in the House of Representatives equally between those favoring and those opposing the motion to discharge and to be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees. An amendment to the motion is not in order.

(g)(1) Except as provided in paragraphs (2) and (3) of this subsection, consideration of a resolution of disapproval shall be in accord with the rules of the Senate and of the House of Representatives, respectively.

(2) When a committee has reported or has been discharged from further consideration of a resolution of disapproval, or when the companion resolution from the other House has been placed on the calendar of the first House, it shall be in order, notwithstanding the provisions of rule XXII of the Standing Rules of the Senate or any other rule of the Senate or the House of Representatives, at any time thereafter (even though a previous motion to the same effect has been disagreed to) to move to proceed to the immediate consideration of either such resolution. The motion is highly privileged in the House and privileged in the Senate and is not debatable. An amendment to the motion is not in order.

(3) Debate on a resolution of disapproval shall be limited to not more than 2 hours (except that when one House has debated its resolution of disapproval, the companion resolution shall not be debatable), which shall be divided in the House of Representatives equally between those favoring and those opposing the resolution and which shall be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees. A motion further to limit debate is not in order. An amendment to, or motion to recommit, the resolution is not in order. A motion to reconsider shall be in order only on the day on which occurs the vote on adoption of the resolution of disapproval, and shall not be debatable. Any other motions shall be decided without debate.

(h) If a resolution of disapproval has been ordered reported or discharged from the committee of the House to which it was referred, and that House receives a resolution of disapproval with respect to the same rule from the other House, the resolution of disapproval of the other House shall be placed on the appropriate calendar of the first House. If prior to the disposition of a resolution of disapproval of one House, that House receives the companion resolution of disapprval from the other House, the vote in the first House shall occur on the resolution of disapproval of the other House.

(i) For purposes of this section—

(1) continuity of session is broken only by an adjournment sine die at the end of a Congress; and

(2) the days on which either House is not in session because of an adjournment or recess of more than 15 days are excluded in the computation of days of continuous session.

(j) For purposes of this section, the term—

(1) "appropriate committee" means either the Committee on Energy and Commerce of the House of Representatives, or the Committee on Commerce, Science and Transportation of the Senate, as the case may be;

(2) "Commission" means the Federal Trade Commission;

(3) "resolution of disapproval" means a concurrent resolution of the Congress, the matter after the resolving clause of which is as follows: 'That the Congress disapproves the recommended final rule issued by the Federal Trade Commission dealing with the matter of_____, which rule was transmitted to Congress on_____.", the first blank being filled with the title of the rule and such further description as may be necessary to identify it, and the second blank being filled with the date of transmittal of the rule to the Congress; and

(4) "rule" means any rule promulgated by the Commission pursuant to the Federal Trade Commission Act (15 U.S.C. 41 et seq.), other than any rule promulgated under section 18(a)(1)(A) of such Act (15 U.S.C. 57a(a)(1)(A)) and any other interpretive or procedural rule.

SECTION 24 OF THAT ACT

SEC. [24.] *25.* There are authorized to be appropriated to carry out the functions, powers, and duties of the Federal Trade Commission not to exceed $42 million for the fiscal year ending June 30, 1975; not to exceed $47,091,000 for the fiscal year ending June 30, 1976; and not to exceed $50 million for the fiscal year ending in 1977; not to exceed $70 million for the fiscal year ending September 30, 1980; not to exceed $75 million for the fiscal year ending September 30, 1981; [and] not to exceed $80 million for the fiscal year ending September 30, 1982*; not to exceed $60,838,000 for the fiscal year ending September 30, 1983; not to exceed $55,100,000 for the fiscal year ending September 30, 1984; and not to exceed $54,600,000 for the fiscal year ending September 30, 1985.*

SECTION 25 OF THAT ACT

SEC. [25.] *26.* This Act may be cited as the "Federal Trade Commission Act".

MINORITY VIEWS OF MESSRS. PACKWOOD, GORTON, AND CANNON

During its consideration of S. 2499, the Committee adopted an amendment offered by Senator Stevens, which would exempt professionals and professional associations entirely from FTC antitrust and consumer protection authority. This special interest exemption for the elite of our society would represent a giant step backward in efforts to protect consumers and bring under control the run-away costs of medical and other professional services. The bill as amended would stop all current and future FTC investigations, studies, intervention projects and rulemakings affecting professionals. We urge our colleagues in the Senate to consider the wisdom of this legislation carefully.

While a number of Committee members have announced their support for the vigorous enforcement of the antitrust laws, the Stevens amendment creates a major exemption from the antitrust laws for professionals. It bars the FTC from doing anything to challenge anticompetitive restrictions imposed by professional groups on professionals wishing to offer lower-cost services.

This amendment is clearly designed to stop the FTC from continuing its efforts to prevent price-fixing, restrictions on advertising, boycotts and other such harmful practices by doctors, lawyers and other professionals. In the past, the FTC has brought worthwhile antitrust cases against the American Medical Association and American Dental Association stopping bans on advertising, cases against doctors and dentists for boycotting cost-containment programs of health insurers, investigations of unfair restrictions on licensed nurse midwives preventing them from furnishing their services, and a study of possible limitations on access for low-income persons and others to legal services.

The FTC's efforts in the professional area have been strongly supported by all members of the present Commission and by both Republican and Democratic-led Commissions of the past. In fact, this type of FTC activity has been one of the most impressively pro-consumer of any the Commission has pursued. Its recent Eyeglass Rule alone has saved consumers millions of dollars by encouraging advertising and by giving consumers the opportunity to shop around to fill their eyeglass prescriptions.

Despite the past accomplishments of the Commission in this area, the Stevens amendment creates a favored class of "professionals" to be totally immune from future FTC cases, rules, and even studies. The sweeping definition of professionals borrowed from a completely unrelated statute could include not only doctors and lawyers but aircraft engineers, draftsmen, lab technicians, surveyors, pharmacists, and many other groups. Despite the breadth of the special interest

exemption created by this amendment, its proponents have pointed to no specific action of the FTC concerning the professions which justifies a complete exemption from the FTC Act. They cannot do so because the long list of FTC actions in this area is clearly pro-consumer and pro-competition.

Rather than identifying specific actions the FTC has taken which they say are inappropriate, the proponents of their amendment say that the matter is better left to state regulation. Yet the State boards, dominated by professionals who regulate themselves, have not taken steps to prevent anticompetitive, anti-consumer restrictions and, in fact, have often opposed the FTC's efforts to do so. This amendment would eliminate the authority of the federal agency which has been most active in challenging these restraints and rely upon these captive regulatory boards to solve problems they helped create.

An exemption from FTC authority will preclude any Federal consumer protection enforcement against professional misconduct such as deceptive advertising. Recently, a group of physicians themselves—the American Society of Plastic and Reconstructive Surgeons—asked the FTC to investigate allegedly deceptive advertising for a new "facelift by laser" procedure. As advertising by professionals becomes more widespread, Federal supervision of advertising will be critical to supplement state and self-regulatory efforts.

Moreover, the argument of the supporters of the Stevens amendment that the Justice Department can fill in for the FTC in the antitrust area is inconsistent with the idea that state regulation is preferred. In fact, the professional groups supporting this amendment want an end to all federal scrutiny of their anti-competitive practices. These groups press for an exemption from the FTC Act because the FTC has been much more active than the Justice Department in enforcing the law in this area.

Accepting the claim that the FTC has in the past proposed or considered some action regarding the professions which would intrude on areas best left to the States, or that the Commission might consider some ill-advised action in the future, the issue is: what is the appropriate remedy; where is the appropriate line between state and federal responsibility? Those supporting the Stevens amendment—the total exemption approach—seem to assume that the only alternatives are current law or a total exemption. This, of course, is inaccurate.

S. 2499, as introduced, struck a sound compromise between broad FTC authority to challenge competitive restraints on professional practices and the role of the states in protecting the public from low-quality services. The original provision would have applied the "State action doctrine", developed in several Supreme Court opinions, to FTC antitrust cases. This limitation would preclude the FTC from challenging anticompetitive restraints where the state has made clear it wants to limit competition. Second, S. 2499, as introduced, would have precluded the Commission from challenging educational or testing requirements for professionals. This limitation would make clear that the state boards would continue to determine persons were qualified to perform particular services.

In our view, this sound compromise is far better than the drastic special interest exemption created by the Stevens amendment. All of the traditional State regulatory activities, educational requirements, licensing, conduct of disciplinary proceedings, etc.—would remain under exclusive state control under a "scope of practice" limitation. To go beyond that and provide complete immunity for plainly anticopetitive restrictions on the commercial aspects of health care delivery is unwarranted and unjustified. The FTC is not trying to "regulate" the professions; it is trying to remove burdensome regulations. For example, it is examining whether certain existing restrictions on commercial eyecare centers and dental clinics are justified or instead constitute an unreasonable restraint on trade.

The argument of the professionals that because they are regulated by the States they should have "complete" immunity from the FTC Act is completely without merit. It is analogous to A. T. & T. claiming that because its operating phone companies are subject to regulation by state public utility commission. A. A. & T. should be totally immune from antitrust scrutiny; a proposition that has been decisively rejected by the courts.

One sometimes unstated basis for exempting the professions from FTC jurisdiction is the perception that the FTC has mishandled some cases involving professionals by issuing overbroad subpoenas, or taking cases to trial that might have been settled, or should not have been brought. But assuming some cases have been mishandled, the proper remedy is to reform procedures—not repeal the antitrust laws.

Many of the procedural concerns expressed regarding FTC proceedings have been addressed in both the bill and the 1980 amendments: tighter subpena requirements; analysis of the costs and benefits of regulation; advanced notice of rulemaking; etc. These amendments are fully adequate to assure fairness in FTC proceedings.

And, fairness, not an exemption is all that the professions need or deserve.

BOB PACKWOOD.
SLADE GORTON.
HOWARD W. CANNON.

MINORITY VIEWS OF MESSRS. PACKWOOD AND GORTON

We oppose sections 8, 12 and 14, of S. 2499, the Federal Trade Commission Amendments of 1982. Section 8 would require the Commission, before ordering affirmative remedies (such as corrective advertising) in its consumer protection cases, to conduct an analysis showing that the potential benefits from such additional relief would outweigh the potential costs. Section 12 would extend, for the length of the authorizaion, the expiring prohibition on (1) Commission study, investigation, or prosecution of any agricultural cooperative for conduct exempt from antitrust scrutiny by the Capper-Volstead Act, and (2) Commission study or investigation of agricultural marketing orders. Section 14 would amend section 5(b) of the FTC Act to prohibit on a permanent basis Commission rulemakings and other cases which prohibit or otherwise regulate commercial advertising on the basis that the advertising constitutes an unfair act or practice.

UNFAIRNESS EXEMPTION FOR COMMERCIAL ADVERTISING

We strongly oppose section 14 of the proposed bill. That section would permanently eliminate the Commission's authority to prohibit unfair commercial advertising by either rulemaking or cases. There is no principled reason for allowing this special exemption for the advertising industry from the rules of fair play that apply to the remainder of the business community. Because advertising is the principal type of promotional activity within the Commission's jurisdiction, it should be the *last* practice to be immune from rules against unfair practices.

LIMITS ON THE COMMISSION'S USE OF UNFAIRNESS AUTHORITY

We recognize that there has been genuine concern that the term "unfair," without statutory definition, may be subject to arbitrary application by some future Commission. Whether or not that concern is valid (although the proponents of this exemption have pointed to no decided case or final rule demonstrating an abuse of this authority), there are a number of limits on the Commission's use of this authority to insure it is used appropriately. First, the definition of "unfairness" now contained in section 2 of this bill will ensure that the Commission cannot find any act or practice unfair unless there is proof of all the criteria included in the statutory standard. Thus, only advertisements which are likely to cause substantial injury to consumers, which are not reasonably avoidable by consumers themselves, and which are not outweighed by countervailing benefits to consumers or competition will be subject to FTC action. Most importantly, any Commission rule or case based upon this standard will be subject to review by the courts.

Second, advertisers have the protection of the First Amendment for nondeceptive "commercial speech", as outlined recently by the Supreme Court in *Central Hudson Gas Corp.* v. *Public Service Commission of New York*, 447 U.S. 557, 564–566 (1980). There the Court held that, if commercial speech is neither misleading nor related to unlawful activity, the government may regulate it only if: (1) there is a substantial interest to be served by the regulation, (2) the regulation directly advances that interest, and (3) the restriction such regulation applies to commercial speech is no more extensive than is necessary. Courts may be expected to review Commission cases and rules closely to ensure that constitutional limitations are observed.

Finally, Commission decisions are always subject to Congressional scrutiny, including oversight hearings, Congressional veto of rules, and even special legislation if a majority in Congress objects to a specific Commission action. Witnesses supporting this exemption pointed to only one Commission action—the beginning of a rulemaking proceeding concerning children's advertising of highly sugared foods—as an "abuse" of unfairness authority. This Commission action, although instituted after encouragement from members of Congress, was effectively terminated by Congressional action. Rather than retain the right to review specific Commission actions, however, this section of the bill creates a total exemption, allowing no Commission action under this authority, no matter how reasonable and beneficial to consumers.

ADVERSE EFFECT OF THIS SPECIAL EXEMPTION

It is argued by supporters of section 14 that the Commission can achieve any legitimate regulatory goal under its authority to stop "deceptive practices." We hope this prediction is true, but only time and protracted, expensive litigation will tell. It is true that the Commission can use the authority to stop deceptive practices whenever an advertisement itself creates a misleading impression. Even absent an affirmative misrepresentation, the law of deception may sometimes require the disclosure of information where the effect of nondisclosure would be to mislead consumers. Thus, the Commission's 1964 ruling to require a warning in cigarette advertising was grounded both upon its deception and its unfairness authority. But it is by no means certain that future Commissions or future courts will treat deception alone as flexible enough to provide an adequate safety valve against injurious advertising.

In addition to casting doubt on the ability of the Commission to evaluate advertising directed to children and to require warnings of the dangers of cigarettes, section 14 effectively repeals *Pfizer, Inc.*, 81 F.T.C. 23 (1972). This was the initial Commission opinion requiring advertisers to have prior substantiation for advertising claims. Contrary to the assertions of the supporters of section 14, the *Pfizer* decision was based only upon the Commission's unfairness authority. While other ad substantiation cases have been upheld both on an unfairness theory i.e., that the advertiser had deceptively implied in the advertisement that it possessed a reasonable basis for claims, the *Pfizer* case is the leading Commission opinion applying the doctrine of marketplace

fairness to advertising. Under unduly narrow court interpretations, the section 14 exemption could undercut the ability of the Commission to require substantiation for advertising by making the requirement depend upon the uncertain outcome of litigation on the question of whether a given advertisement states or implies there is such substantiation. A doctrine at the heart of consumer trust in advertising should not be subject to such level uncertainty. Although even the proponents of section 14 have said that they do not intend for repeal of unfairness authority to affect the advertising substantiation rule, which they support, their proposal could unwittingly do so.

Section 14 also would remove the clearest legal ground on which the Commission has been able to prohibit advertisers from depicting unsafe behavior—such as reckless use of electrical appliances or tricycles—which may be imitated by children. Thus, the section could further prevent the Commission from prohibiting unsafe advertising techniques, such as carelessly distributing free samples of products that may be unsafe in the hands of children. (In one FTC case, a company inserted poorly packaged samples of *razor blades* in home-delivered newspapers.) These cases protecting children were based primarily on the Commission's unfairness authority. Finally, section 14 could jeopardize the Commission's ability to require companies to disclose key product information to consumers. We have already noted how it could affect the Commission's ability to require warnings in cigarette ads. As to other products, such as over-the-counter drugs, the Commission would probably retain some authority to require warnings about unknown, substantial health risks from product use. In addition, the Commission might be able to use its deception authority to require disclosure of information seriously at odds with reasonable, foreseeable consumer assumptions about the fundamental nature of a product, such as that it is new and does not contain hidden defects. However, the Commission could be powerless to require the disclosure of other information in advertising—such as R-value standards in ads for home insulation and octane ratings on gasoline pumps, information that is nevertheless critical to informed purchase decisions.

UNCERTAIN SCOPE OF SECTION 14

An additional major shortcoming in section 14 is that the definition of "commercial advertising" is vague. While the proponents of this exemption seek to confine it narrowly to include only print and broadcast materials, those wishing to engage in unfair practices may be expected to argue for a broader reading that would encompass their particular realm of endeavor. Since virtually every activity the FTC policies involves, like advertising, the use of the word designed to affect consumer behavior, we fear that this special interest exemption for advertisers will be eagerly embraced by all manner of others who would seek an escape from the law. Consequently, section 14 raises questions about whether it, conversely, covers such areas as labeling, point-of-sale literature or oral sales presentations. A broad reading of "advertising" could carve inroads into the Commission's basic authority to protect consumers from any unfair practice.

CONCLUSION

In short, repealing the Commission's authority over unfair advertising would create a great deal of uncertainty in the law about the Commission's ability to continue actions which have been strongly supported by Congress and the public. Balanced against this clear risk to the Commission's ability to protect consumers, this section offers no benefits to the general public and simply carves out a special interest exemption for one type of commercial activity.

Given the protections afforded legitimate advertising by both the First Amendment and the narrowed definition of "unfairness" in section 2, honest, ethical advertisers have no need for the special interest exemption in section 14. In fact, we believe this exemption is contrary to the interest of this majority of scrupulous advertisers—it could be perceived by the public as a license to perpetrate unfair advertising in the media, and thereby undermine decades of cooperative work to build the public confidence in the integrity of advertising.

AGRICULTURAL COOPERATIVES

Without the slightest scrutiny, the Committee adopted an amendment, offered by Senator Kasten during Committee consideration of S. 2499 (now section 12 of the bill), that would prohibit the FTC from initiating studies, investigations or prosecutions of agricultural cooperatives under the FTC or Clayton Antitrust Acts until the Secretary of Agriculture and the courts make a determination that the activities in question fall outside the scope of the limited Capper-Volstead antitrust exemption for cooperatives. The FTC or any affected person would have the right to obtain judicial review of the Secretary's determination; therefore, no such determination would become final until judicial review was completed or the time for appeal had expired.

We strongly oppose the enactment of section 12 of this bill, which we believe could effectively remove the FTC from all antitrust enforcement activity concerning agricultural cooperatives. This section would prohibit the FTC from even initiating an investigation of an agricultural cooperative until the Secretary of Agriculture has made a final determination with respect to the applicability of the Capper-Volstead exemption to the particular conduct in question. The provision would not require the Secretary to make a determination within any specified period of time. As a result, an FTC investigation or prosecution of illegal agricultural cooperative activity could legally be delayed for years, no matter how unrelated to the Capper-Volstead exemption such activity was. The Commission could be prevented from taking action against even the most egregious antitrust violations, for example, a price-fixing agreement between a cooperative and an unrelated grocery store chain—regardless of well-established precedent. Moreover, the provision could render the FTC virtually powerless to investigate or to challenge illegal mergers and acquisitions by agricultural cooperatives by, in essence, repealing FTC authority under the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvement Act.

Section 12 could also impair the Commission's ability to enforce its consumer protection authority to prevent unfair or deceptive acts or practices. The provision could seriously delay FTC challenges of the most blantant cases of false or deceptive advertising by an agricultural cooperative, even though no one would argue that such advertising was immunized by the Capper-Volstead Act.

This provision is an unprecedented delegation to a Cabinet official of veto power over the law enforcement decisions of an independent agency of the Congress. It would authorize the Secretary of Agriculture to make jurisdictional determinations that historically have been delegated to law enforcement agencies subject to judicial review. The provision could permit agricultural cooperatives to engage in illegal nonexempt conduct for several years pending a final determination. It could give the Secretary of Agriculture—who has virtually no antitrust expertise but whose principal statutory responsibility involving agricultural cooperatives is to promote them—the power to grant de facto exemptions from the antitrust and consumer protection laws to cooperatives on an ad hoc basis.

Section 20 of the FTC Improvements Act of 1980 prohibits the Commission from using funds authorized in 1980, 1981, and 1982 for the "purpose of conducting any study, investigation, or prosecution of any agricultural cooperative" for any conduct which would fall within the scope of the Capper-Volstead antitrust immunity. As the Conference Report explained:

> This section has been added to ratify the spirit and intent of the Capper-Volstead Act (7 U.S.C. 291–292). The conferees believe that the rationale for the limited antitrust exemption contained in the statute is valid.

In our view, section 12 of the bill goes far beyond the intent of Congress in enacting section 20. Such a broad and far-reaching proposal should not be adopted without the benefit of careful deliberation and extensive analysis. This proposal was raised for the first time during the Committee's consideration of S. 2499. The Committee has not had the opportunity to hold hearings on the merits of the provision or to solicit views from persons and agencies that may be affected by it.

The real explanation for section 12 may be that the FTC is currently litigating an antitrust case against Dairymen, Inc. for an allegedly anticompetitive acquisition of a proprietary competitor. Perhaps because the Supreme Court has already ruled in *Maryland & Virginia Milk Producers Association* v. *United States*, 362 U.S. 458 (1960), that this type of acquisition is not exempt under the Capper-Volstead Act, Dairymen, Inc. has been unable to convince the FTC or the federal courts to dismiss the case. As a result, Dairymen, Inc. has turned to Congress to get a "bailout". At the very least, section 12 should be prospective in its application.

Cost-Benefit Requirement for FTC Orders

We oppose section 8 of the bill, which, we believe would require the Commission to engage in unnecessary and burdensome procedures in evaluating the "costs and benefits" of "affirmative relief" provisions in

adjudicative orders, with little, if any, improvement in the Commission's decision-making process.

It is well established that the Commission is already required to engage in an analysis of all of its proposed orders to ensure that they are "reasonably related" to the law violations they seek to correct.[1] Clearly, the FTC should not have absolute discretion to prescribe the future conduct of companies that have violated the FTC Act. However, we believe that it is necessary for the Commission to have enough discretion and flexibility to fashion affirmative remedies—such as corrective advertising—that are appropriate to the circumstances of a particular case.

Requiring the Commission to engage in a cost-benefit analysis in every case where it determines to order some form of affirmative relief could actually be counterproductive. For example, by placing a premium on the ability of the Commission to predict the benefits of its order provisions, this section could discourage the use of innovative remedies which could actually be less intrusive on the business practices of the offending company.

Commission orders are now based on factors such as past precedent, the seriousness of the violation, an assessment of how likely the violation is to be repeated, the effect upon the respondent firm and arguments and analyses by Commission staff and company lawyers. These are the very factors that courts rely on in fashioning equitable remedies in private litigation. We believe that these are also the types of law enforcement considerations which are the appropriate standards to guide and limit the Commission's discretion in fashioning remedies, not "cost-benefit" principles borrowed from other contexts.

Finally, even though section 8 specifies that the cost-benefit requirements are not judicially reviewable, it is our view that the provision would result in relay in ongoing enforcement matters and a reduction in settlements, by generating and encouraging debate over the Commission's ability to support a cost-benefit analysis.

BOB PACKWOOD.
SLADE GORTON.

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[1] *E.g., Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946); *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392–95 (1965).

MINORITY VIEWS OF MESSRS. GORTON AND CANNON

Section 16 would reauthorize the Commission for 3 years at Office of Management and Budget recommended funding levels of $60,838,000 (fiscal year 1983), $55,100,000 (fiscal year 1984) and $53,600,000 (fiscal year 1985). These OMB figures are meant to be appropriation levels, not authorization levels. The current estimate of 1982 appropriations under the Continuing Resolution for the Commission is $68,774,000. The existing authorization is $80 million for fiscal year 1982. The authorization should at least leave some cushion for changed circumstances. It is one thing to require a later supplemental appropriation; it is folly to create the likely need for a later amended reauthorization. In his prepared statement before the Committee, even Chairman Miller, who supports the OMB figures, testified that:

> The Commission believes that the authorized funding levels should accommodate limited upward flexibility (for example, by 10 percent), to facilitate matters should the President and Congress wish the Commission to have more money in subsequent years.

At stake here may be four of the FTC regional offices. The Commission recently voted to close its Regional Offices in Boston, Seattle, Los Angeles, and Denver. It is apparent from public statments by the four Commissioners that this decision was based largely upon budgetary considerations. The budget restraints involved, however, are those proposed by the administration for the fiscal year 1983 budget. The Commission was anticipating that the Congress will enact what the OMB has proposed, but seeks to complete the process of closing down these four offices by July 15, 1982 in order to assure that the costs associated with this process are incurred in fiscal year 1982.

We can understand the Commissioners' concerns, but we believe it is inappropriate for the Commission to undertake such a drastic change in structure based upon budget reductions which have not been enacted, and which may not in fact occur. Although a majority of this Committee approved this legislation inorporating the OMB funding recommendations, there is substantial indication that a majority of Congress may not agree.

Appended to these separate views is a letter to FTC Chairman Miller, dated May 13, 1982, and cosigned by Senator Weicker and Congressman Smith, Chairmen of the Senate and House Appropriations Subcommittees, which asks the Commission to "terminate all actions with respect to the closing of these offices in order that Congress may proceed, in normal course, to consider and act upon the 1983 budget request." We are informed that a mutual understanding along these lines has been reached. On Tuesday, May 25, 1982 the Senate Subcommittee, chaired by Senator Weicker, held a hearing concerning the

closing of these offices. It is clear that the subcommittee intends to look further into this matter. The Urgent Supplemental Appropriations Bill, as is passed the Senate on May 27, 1982, contained language prohibiting the FTC from using 1982 funds to close the regional offices.

On April 22, 1982, the House Commerce, Consumer and Monetary Affairs Subcommittee, Committee on Governmental Operations also held a hearing on the closing of these offices. The subcommittee concluded: that the regional offices are the most productive aspect of FTC operations; that they are cost/beneficial; that closing four of them will have an adverse impact on the ability of the FTC to enforce existing antitrust and consumer protection laws: that the closings will have an adverse impact on consumers and small businesses in the affected regions and nationwide: that state and local law enforcement officials will not be able to pick up this slack; that ongoing cases and investigations at the four offices either will not be pursued or will be more expensive to pursue; and that the FTC did not undertake sufficient analysis to close these offices for budgetary or management reasons.

We believe it would be a mistake for the Commission to unilaterally dismantle the established regional structure which has proven itself to be very cost-effective and has been a major part of the Commission's enforcement capability. In 1980, for example, the regional offices had only about 16 percent of the FTC's total budget, but these offices negotiated 61 percent of the Commission's consent agreements, litigated 50 percent of its complaints issued that year and obtained nearly all of the consumer redress won by the Commission that year. The regional offices have obtained more than $100 million in consumer redress during the past 3 years, enough to offset their operating costs for 7 years.

Review of any agency's structure and regional operations should not be beyond scrutiny; but basic changes in agency structure should be made only after full agency consultation with the Congress.

S. 2221, introduced by Senator Cannon, extends the authorization of the agency for 3 years at the same level of funding as the Senate Commerce Committee recommended to the Senate Budget Committee ($68.8 million for fiscal year 1983: $70.5 million for fiscal year 1984; $72.3 million for fiscal year 1985). We recommend those authorization levels. At the very least, we recommend that the authorization freeze the Commission's funding at the 1982 appropriations level of $68.774 million.

U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
Washington, D.C., May 13, 1982.

Hon. JAMES MILLER,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR CHAIRMAN MILLER: The recent decision by the Federal Trade Commission to close regional offices in Boston, Denver, Seattle, and Los Angeles is of considerable concern to us and a number of members of the Congress. The impact of this decision on consumers, small busineses and on state and local enforcement agencies, as well as on the Commission itself must be fully evaluated.

Funds available to the Commission for fiscal year 1982 are sufficient to maintain all regional offices. It is our understanding that the Commission is undertaking this action in order to prepare for budget reductions of substantial proportion which may be forthcoming if the Congress approves the budget estimate currently pending for fiscal year 1983. Regrettably, the decision to close these offices, effective July 15, 1982, will preempt any congressional decision with respect to the 1983 budget request and the regional offices.

We feel confident that the Commission did not intend to deny Congress its legitimate voice in establishing an appropriation for the Commission. Therefore, we believe it would be both desirable and prudent for the Commission to terminate all actions with respect to the closing of these offices in order that Congress may proceed, in normal course, to consider and act upon the 1983 budget request. We believe that this course will be least disruptive to the Commission's activities.

With best regards.

Sincerely,

NEAL SMITH,
Chairman,
Commerce, Justice, and State the Judiciary and Related Agencies Subcommittee.

LOWELL WEICKER, JR.,
Chairman,
State, Justice, and Commerce, the Judiciary and Related Agencies Subcommittee.

ADDITIONAL VIEWS OF MR. KASTEN

During the Committee's consideration of the FTC reauthorization bill, the Commission voted to implement an earlier decision to restructure its regional operations. Under this new structure the Commission will have 6, rather than the current 10, regions.

I strongly support the Commission's decision, as it is fully consistent with legislative direction given by the House and Senate Committees on Appropriation. The House and Senate reports accompanying the Commission's fiscal year 1982 appropriations bill specifically directed the Commission to reevaluate the configuration and placement of its regional offices. Further, the restructuring decision is consistent with the budget levels set by this Committee for the Commission.

I also believe that the regional restructuring will substantially improve management of the Commission. As a consequence, the agency will be able to provide more efficient and effective delivery of services to the American public.

In testimony delivered before the House Subcommittee on Commerce, Consumer, and Monetary Affairs, FTC Chairman Miller identified a number of serious management problems that exist with respect to the Commission's regional offices. A major problem that currently exists is that workload is not proportionately divided among the 10 regional offices. In addition, because of the number of regional offices and their geographic separation from the Commission's staff in Washington, communication is difficult, particularly in connection with providing guidance to regional attorneys and in supervising and reviewing their work. And cases that originate in the regions often lack thorough economic analysis because regional attorneys are not in daily contact with the Commission's economists.

Chairman Miller has testified that the new regional structure will eliminate each of these problems. The new regional boundaries that have been established by the Commission ensure that each region will bear a proportionate share of the regional workload. The restructuring also will enable senior staff located in Washington to work more closely with regional attorneys in developing a coordinated, coherent approach to law enforcement that is based on sound economic reason. Finally, a smaller number of regional offices will allow improved communication between staff in Washington and staff in the regions.

In sum, I strongly support this restructuring plan as it is designed to achieve important management goals and has been developed fully in accord with Congressional direction.

BOB KASTEN.

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